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1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF TEXAS

3 - - -

4 THE HONORABLE GEORGE C. HANKS, JR., JUDGE PRESIDING

5 USA,

No. 4:21-CR-00009-1

6 Plaintiff,

7 VS.

8 ROBERT T. BROCKMAN,

ORIGINAL

9 Defendant.

10 COMPETENCY HEARING -- DAY 8 AM SESSION

11 OFFICIAL REPORTER'S TRANSCRIPT OF PROCEEDINGS

12 Houston, Texas

13 WEDNESDAY, NOVEMBER 24, 2021

14 APPEARANCES:

15 For the Plaintiff: COREY J. SMITH, DOJ

16 CHRISTOPHER MAGNANI, DOJ

17 LEE F. LANGSTON, DOJ

18 BORIS BOURGET, DOJ

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20 at Law21 COLLEEN O'CONNOR, ESQ., ATTORNEY
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1 WEDNESDAY, NOVEMBER 24, 2021 -- 10:19 A.M.

10:06:55 2 --o0o--

10:19:50 3 THE COURT: Good morning, everyone.

10:19:59 4 MR. LOONAM: Morning, Your Honor.

10:20:00 5 THE COURT: Mr. Langston, were you
10:20:01 6 examining the witness and you may continue. Is
10:20:05 7 there something...

10:20:05 8 MR. LOONAM: Very briefly. Just to set
10:20:09 9 expectations, -- you know, in light of my misguided
10:20:12 10 optimism that we had the chance to finish yesterday,
10:20:17 11 I indicated to the Court that, you know, this would
10:20:19 12 be our last witness. But since we're now convened
10:20:23 13 and for -- you know, with the day available, we
10:20:25 14 think, you know, we're going to call two additional
10:20:28 15 short witnesses.

10:20:29 16 THE COURT: Okay.

10:20:30 17 MR. LOONAM: Just wanted to advise the
10:20:32 18 Court of that after Mr. Romatowski.

10:20:34 19 THE COURT: Sure. Have they disclosed
10:20:36 20 the witnesses to you so you guys know?

10:20:38 21 MR. COREY SMITH: Well, we got an
10:20:39 22 e-mail after ten o'clock last night they were
10:20:43 23 calling two additional witnesses, Your Honor. So we
10:20:44 24 were relying on the fact they represented to the
10:20:47 25 Court this would be the last witness.

10:20:48 1 THE COURT: Yeah, the problem -- okay.
10:20:51 2 MR. VARNADO: Can I just maybe -- point
10:20:53 3 of clarification? These are just the two witnesses
10:20:55 4 we had told them on Monday night would be -- you
10:20:57 5 know would be yesterday. Same people.

10:20:59 6 THE COURT: Right. But then the
10:21:00 7 problem is you've told them -- you didn't tell
10:21:02 8 them -- the rule was by five o'clock to let them
10:21:05 9 know, so they can be prepared to go and depose
10:21:08 10 these folks -- not depose, but ready to go.

10:21:10 11 MR. LOONAM: Okay.

10:21:11 12 THE COURT: No, I'm not -- let me think
10:21:14 13 this through. Because I want to make sure that all
10:21:16 14 of the witnesses -- the Court gets all of the
10:21:20 15 information that it needs to make a determination.
10:21:23 16 The problem I have is that if they weren't prepared,
10:21:29 17 now instead of having a crisp, clean examination
10:21:32 18 it's going to drag out because they weren't --
10:21:35 19 they've got to re-tool and get ready to take these
10:21:39 20 witnesses on cross.

10:21:40 21 MR. LOONAM: Absolutely understood.
10:21:41 22 That's a good reason for the rule. I just want to
10:21:44 23 make clear to the Court these two witnesses were on
10:21:47 24 our list to testify for yesterday. So those crisp,
10:21:50 25 clean crosses should have been prepared to do these

10:21:54 1 witnesses yesterday. The cross of the expert, to,
10:22:00 2 you know -- understandably, you know, it -- the --
10:22:03 3 the -- the examination took a longer time than I
10:22:05 4 think we anticipated, so those two witnesses didn't
10:22:08 5 get on the stand.

10:22:11 6 But, look, the rule is there for a
10:22:13 7 good reason. If the -- the Government believes it's
10:22:16 8 not prepared to cross the two witnesses because of
10:22:19 9 the late e-mail and Your Honor's rule, we
10:22:22 10 understand. If we have to rest, we'll rest.

10:22:24 11 THE COURT. Who are the witnesses?

10:22:26 12 MR. LOONAM: Ms. Keneally and
10:22:28 13 Dr. Slade.

10:22:29 14 THE COURT: Okay. Two fact witnesses
10:22:35 15 that arguably aren't repetitive. I mean, Mr.
10:22:39 16 Romatowski works for the firm, but Dr. Slade -- is
10:22:42 17 it Mister -- Dr. Slade?

10:22:44 18 MR. COREY SMITH: Dr. Slade.

10:22:45 19 MR. LANGSTON: Dr. Slade.

10:22:48 20 THE COURT: Let me think it through.
10:22:50 21 Because the rule is in place to make sure that we
10:22:55 22 get this done quickly and efficiently. At the same
10:22:58 23 time, the Court wants to make sure that everyone
10:23:02 24 that needs to be heard is heard. This is a criminal
10:23:04 25 matter. Mr. Brockman's life and liberty is at issue

10:23:08 1 here. I don't want to prevent the parties from
10:23:12 2 putting on all of the evidence they think that the
10:23:13 3 Court should consider.

10:23:15 4 MR. LOONAM: And, Your Honor, just --
10:23:17 5 you know --

10:23:17 6 THE COURT: -- it wasn't intentional.

10:23:19 7 MR. LOONAM: Yeah. So we had gotten
10:23:21 8 out and said, "Oh, goodness. We have to send in the
10:23:24 9 list," and we did as soon as it triggered.

10:23:27 10 But I understand the -- the rule.
10:23:29 11 If the Government believes it's prejudiced we'll --
10:23:31 12 we'll -- we'll rest.

10:23:33 13 THE COURT: Okay. Let me hear from the
10:23:34 14 Government.

10:23:35 15 MR. COREY SMITH: I understand of
10:23:36 16 course -- excuse me -- due process to be adhered to,
10:23:39 17 but they were prepared to rest yesterday without
10:23:41 18 calling these witnesses. They said, "This is going
10:23:44 19 to be our last witness."

10:23:46 20 Have we prepared some? Yes, of
10:23:48 21 course. We were told they would be called
10:23:52 22 yesterday, but then we relied on their
10:23:54 23 representation they're not calling them, until 10:10
10:23:57 24 last night we suddenly got an e-mail, "By the way,
10:24:00 25 we're putting those two back on."

10:24:02 1 They were prepared to rest
10:24:04 2 yesterday. I think we have the right to rely on
10:24:07 3 that.

10:24:07 4 THE COURT: Let me take it under
10:24:08 5 advisement. As I said -- this is a criminal matter.
10:24:13 6 My primary concern -- the rules are in place for a
10:24:17 7 reason, but my primary concern is due process. Let
10:24:20 8 me think it through, and then I'll get back to the
10:24:22 9 parties after this witness.

10:24:24 10 MR. LOONAM: Thank you, Your Honor.

10:24:25 11 THE COURT: Dr. Slade and Ms. Keneally?

10:24:27 12 MR. LOONAM: Correct, Your Honor.

10:24:29 13 THE COURT: Okay.

10:24:30 14 MR. LOONAM: In reverse order. We
10:24:31 15 would call Ms. Keneally and then Dr. Slade.

10:24:34 16 THE COURT: Okay.

10:24:35 17 MR. COREY SMITH: Thank you, Your
10:24:36 18 Honor.

10:24:36 19 THE COURT: You may proceed.

20 **PETER ROMATOWSKI,**

21 **(For the Defense)**

22 having previously been called as a
23 Witness, and having already been duly and regularly
24 sworn, continued to testify as follows:

25 MR. LANGSTON: Now I feel pressured to

10:24:47 1 do a crisp, clean cross.

10:24:47 2 THE COURT: We're here. If we can't
10:24:50 3 get it done, Friday is available. This is very
10:24:53 4 important. As all of you know, it's as much time as
10:24:58 5 it takes.

10:24:58 6 CROSS-EXAMINATION RESUMED

10:25:01 7 **BY MR. LANGSTON:**

10:25:01 8 Q. Good morning again, Mr. Romatowski.

10:25:03 9 A. Good morning.

10:25:03 10 Q. So I think when we spoke yesterday we were
10:25:07 11 speaking about how you've been off the case for a
10:25:09 12 little while?

10:25:10 13 A. Well, I haven't been off the case.

10:25:13 14 Q. Okay. But you haven't met with Mr. Brockman
10:25:16 15 since February of 2020?

10:25:18 16 A. Correct.

10:25:19 17 Q. When was the last time you spoke to
10:25:21 18 Mr. Brockman on the phone?

10:25:22 19 A. I believe that -- he and I were last together
10:25:27 20 on the phone in a group when we were conferring
10:25:31 21 about one of the pretrial conferences in this case
10:25:37 22 sometime in recent months, perhaps going back to the
10:25:39 23 summer.

10:25:40 24 Q. Okay. How about before then?

10:25:42 25 A. There were several such occasions across 2021,

10:25:53 1 but a small handful -- two, three, or four times.

10:25:55 2 Q. So two or three times since February of 2020;
10:25:58 3 is that fair?

10:26:00 4 A. Well, going back. I was speaking -- working
10:26:03 5 backwards across 2021. Several more occasions --
10:26:07 6 well, actually 2020 there was activity of course
10:26:12 7 prior to the indictment. My goodness, from memory
10:26:20 8 you know perhaps half a dozen to a dozen times, um,
10:26:23 9 after the meeting in February and all by telephone.

10:26:28 10 Q. And that compares to earlier when I think you
10:26:31 11 said you had countless phone calls with him?

10:26:34 12 A. Well, more than I can count sitting here today.
10:26:37 13 That's true.

10:26:38 14 Q. And one of the reasons you stopped meeting with
10:26:41 15 him in person was the COVID pandemic?

10:26:45 16 A. Well, that was the reason, yes.

10:26:47 17 Q. Okay. And since then, at least some of the
10:26:50 18 people you work with have been meeting with
10:26:52 19 Mr. Brockman in person again?

10:26:54 20 A. Yes.

10:26:54 21 Q. And you have not?

10:26:55 22 THE COURT: Mr. Langston, before we go
10:26:58 23 on --

10:26:58 24 Can we just clarify,
10:27:03 25 Mr. Romatowski, when was the date that Jones Day was

10:27:05 1 engaged to represent Mr. Brockman?

10:27:07 2 THE WITNESS: We -- Bob first called me
10:27:11 3 in late August. I don't have the date, but there's
10:27:15 4 a record of the date.

10:27:18 5 THE COURT: The year, I'm sorry?

10:27:20 6 THE WITNESS: Of 2018. And then, of
10:27:25 7 course, it was necessary before we got much detail
10:27:27 8 from him to run a conflicts check. So first
10:27:30 9 conversations were very much -- a priority was to
10:27:33 10 get lists of entities, persons involved, and so on
10:27:37 11 so we could run a conflicts checks of that sort. So
10:27:39 12 there is a process that has to run its course before
10:27:45 13 we're formally engaged.

10:27:48 14 So we were formally engaged
10:27:50 15 sometime in the month of September is the best I can
10:27:53 16 do.

10:27:53 17 THE COURT: Oh, no problem. Really
10:27:55 18 quickly, as part of that conflicts check you want to
10:27:57 19 find out if there was anyone or any companies that
10:28:01 20 Mr. Brockman was involved in litigation with; right?

10:28:05 21 THE WITNESS: Well, it's broader than
10:28:06 22 that, Your Honor. It's -- you know, Jones Day is a
10:28:09 23 large firm. The question was do -- have we ever had
10:28:14 24 any relationship with any person or entity that
10:28:19 25 might come up in this case, whether the prior

10:28:22 1 relationship was with somebody as a client or
10:28:26 2 adverse to somebody in litigation, or opposite them
10:28:30 3 in a corporate transaction -- all of those are
10:28:34 4 considered.

10:28:34 5 Like every law firm, we have an
10:28:36 6 elaborate database that records that sort of
10:28:41 7 information historically. The checks are run
10:28:45 8 against that.

10:28:46 9 THE COURT: Okay. I'm sorry.

10:28:48 10 MR. LANGSTON: No problem.

10:28:49 11 Q. Where did you get the information to run those
10:28:51 12 checks?

10:28:54 13 A. From Mr. Brockman and from -- and based on
10:28:59 14 information from him, we did inquiries of our own to
10:29:03 15 try to gather all of the names we thought might be
10:29:06 16 -- might be useful to check.

10:29:08 17 Q. So it's fair to say that at least in September
10:29:10 18 of 2018, you were able to get information from
10:29:13 19 Mr. Brockman?

10:29:14 20 A. Oh, yes. We -- we got some of the threshold.
10:29:19 21 We gathered more on our own. There came a time that
10:29:24 22 we got -- we -- we learned of the search of Carlos
10:29:28 23 Kepke's premises. We heard a list of names that
10:29:35 24 were the subject of that search warrant. I don't
10:29:40 25 know that we ever -- that we saw -- I don't remember

10:29:42 1 when it was we finally saw the documents themselves,
10:29:44 2 but we learned of names that had been included --
10:29:49 3 cited in the Kepke search warrant. We ran all of
10:29:52 4 those, of course.

10:29:53 5 So it was a process. And even
10:29:55 6 after we had been formally engaged, as new names
10:30:00 7 came up -- um, for a period of time we would run
10:30:03 8 those as well just to make sure we hadn't missed
10:30:06 9 something because we hadn't been aware.

10:30:08 10 THE COURT: Can I? I'm sorry.

10:30:09 11 MR. LANGSTON: No, of course, Your
10:30:10 12 Honor.

10:30:10 13 THE COURT: And as part of the process,
10:30:12 14 did you run any names connected with the antitrust
10:30:16 15 litigation that Mr. Brockman's company was involved
10:30:17 16 in or that Mr. Brockman was going to testify in?

10:30:20 17 THE WITNESS: I don't think so. I
10:30:21 18 don't remember that we did, and I doubt that we did.
10:30:23 19 I don't remember when I first learned of the
10:30:28 20 antitrust litigation, but I believe it was some
10:30:30 21 months into the representation.

10:30:37 22 MR. LANGSTON:

10:30:37 23 Q. And I think you said you at some point learned
10:30:39 24 of the Kepke search warrant, but the Kepke search
10:30:43 25 warrant was prior to when you began working with

10:30:45 1 Mr. Brockman?

10:30:46 2 **A.** That's what I learned, yes.

10:30:46 3 **Q.** I think you talked a little bit about the

10:30:49 4 5.5 million documents involved in this case?

10:30:52 5 **A.** Well, what I understand is the electronic

10:30:54 6 production is the equivalent of an estimated

10:30:58 7 5.5 million pages. I think the document estimate I

10:31:03 8 got was something -- was, I believe, 1.3 million

10:31:07 9 documents.

10:31:07 10 **Q.** Okay. And have you been reviewing those

10:31:09 11 documents?

10:31:11 12 **A.** Well, I've seen some of them. The process of

10:31:18 13 systematic review of all that material blessedly

10:31:21 14 falls to a very capable army of other lawyers.

10:31:23 15 **Q.** Sure. Have you reviewed any of those documents

10:31:26 16 with Mr. Brockman?

10:31:27 17 **A.** Yes.

10:31:33 18 **Q.** What is Don Jone's name on the encrypted e-mail

10:31:36 19 system?

10:31:36 20 **A.** I don't remember.

10:31:37 21 **Q.** What is the name of the encrypted e-mail system

10:31:41 22 from 2015 to 2018?

10:31:43 23 **A.** I don't remember.

10:31:44 24 **Q.** Have you reviewed any of the documents

10:31:46 25 associated with that encrypted e-mail system?

10:31:49 1 **A.** I -- I've seen -- well, you called it the
10:31:53 2 encrypted e-mail system. I've seen documents that
10:31:57 3 on their face come from an e-mail system that have
10:32:00 4 been produced in this case, yes.

10:32:01 5 **Q.** And that's the hannah.com e-mail system?

10:32:06 6 **A.** Well, that domain name -- if that's the right
10:32:10 7 expression for hannah.com -- is familiar to me. I'm
10:32:14 8 aware of it, so I likely have seen documents that
10:32:16 9 reflect that domain.

10:32:19 10 **Q.** Okay. I think you testified yesterday that one
10:32:22 11 of the reasons you didn't attend the hearing was
10:32:24 12 because you were going to be listed as a witness --
10:32:26 13 you had been listed as a witness in this case?

10:32:29 14 **A.** Right.

10:32:29 15 **Q.** And it's fair to say that there'd been sort of
10:32:32 16 a large witness list for the September hearing, is
10:32:35 17 that fair?

10:32:36 18 **A.** Well, I believe -- there was a large witness
10:32:39 19 list so as to provide notice of anyone that might be
10:32:42 20 called, so as not to catch anyone by surprise. And
10:32:47 21 that as preparation proceeded, that list shrank down
10:32:53 22 to a smaller number.

10:32:55 23 **Q.** It's fair to say at least as of November 8,
10:32:59 24 2021, you had dropped off the list is that fair?

10:33:02 25 **A.** I don't know.

10:33:10 1 Q. Show the witness marked as 174 for
10:33:13 2 identification.

10:33:13 3 THE COURT: Okay.

10:33:15 4 MR. LANGSTON:

10:33:15 5 Q. Actually, before I show it to the witness, were
10:33:18 6 you involved in the -- sort of decisions as to who
10:33:21 7 would be called as a witness in this case?

10:33:24 8 A. I was -- well, want to be careful here because

10:33:28 9 there's work product protection in our
10:33:33 10 deliberations. But suffice it to say, yes, I've
10:33:36 11 been involved in strategy discussions about the case
10:33:40 12 at large, and about the conduct of this hearing as
10:33:44 13 well, throughout.

10:33:47 14 Q. Okay. So you are aware of who -- where the
10:33:49 15 discussion was going, in terms of who was called as
10:33:52 16 a witness?

10:33:54 17 A. Well, where the discussion was going -- that
10:33:57 18 implies a trend, I suppose. I was aware of the
10:33:59 19 discussions. I was aware that, as is commonplace in
10:34:04 20 litigation, we started with a larger list and
10:34:07 21 gradually -- especially in view of the time set
10:34:10 22 aside for the hearing and limits of time, that got
10:34:14 23 narrowed down.

10:34:18 24 Some people dropped off. I think
10:34:20 25 perhaps some others were added on to get to the

10:34:22 1 smaller lists that appeared here this -- these past
10:34:24 2 two weeks.

10:34:25 3 Q. Okay. Were you involved in -- well, I'll put
10:34:31 4 174 on the screen.

10:34:32 5 MR. LOONAM: Your Honor, this is not an
10:34:33 6 objection. It's just, um, I asked -- we're not
10:34:36 7 waiving work product protection in any broad way.
10:34:43 8 So I ask us to be mindful to see if we can do this
10:34:45 9 in a way that doesn't waive work product or specific
10:34:49 10 attorney-client privilege communications.

10:34:52 11 MR. LANGSTON: Okay.

10:34:52 12 THE COURT: The witness shouldn't
10:34:54 13 answer if it's privileged.

10:34:56 14 MR. LANGSTON:

10:34:56 15 Q. Okay. I'll hand the witness a copy of 174.
10:34:59 16 May I approach?

10:35:00 17 THE COURT: Sure. If it's
10:35:01 18 attorney-client privilege, then you shouldn't have
10:35:03 19 it. So obviously not privileged, so...

10:35:07 20 MR. LOONAM: That's right. But -- but
10:35:10 21 -- but -- so absolutely if he has it, it's not
10:35:13 22 privileged, and it's not work product if he has it.
10:35:16 23 But this sort of -- discussions leading up to --

10:35:19 24 THE COURT: Right.

10:35:20 25 MR. LOONAM: -- what went out, that's a

10:35:22 1 different story.

10:35:22 2 THE COURT: Definitely.

10:35:24 3 MR. LANGSTON:

10:35:24 4 Q. Have you seen this before?

10:35:28 5 A. I don't know if I have before or not.

10:35:30 6 Q. And this is an e-mail --

10:35:31 7 A. I can't remember.

10:35:32 8 Q. -- this is an e-mail from Ms. Keneally to the

10:35:37 9 Government on November 8, 2021?

10:35:39 10 A. Yes, I see that.

10:35:40 11 Q. You are not on the list of many, many people

10:35:42 12 copied on this, are you?

10:35:43 13 A. Correct.

10:35:44 14 Q. You see the fact witnesses?

10:35:47 15 A. Yes.

10:35:47 16 Q. And you are not one of the fact witnesses

10:35:50 17 listed; is that fair?

10:35:52 18 A. Correct.

10:35:53 19 Q. At least as of November 8th, you were not going

10:35:55 20 to be a witness in this case?

10:35:56 21 A. That's what's reflected here.

10:36:00 22 Q. I'm asking, at least as of November 8th, were

10:36:02 23 you told you might have to be a witness in this

10:36:04 24 case?

10:36:04 25 A. I can't remember. There were discussions about

10:36:08 1 whether or not I should testify, whether --

10:36:10 2 MR. LOONAM: Objection.

10:36:12 3 MR. LANGSTON: I think the witness said
10:36:13 4 he can't remember, and I'm happy to take that
10:36:15 5 answer.

10:36:16 6 THE COURT: Yeah, we don't want to talk
10:36:17 7 about discussions. I know that you want to, but I
10:36:19 8 think that might push us a little too close.

10:36:22 9 THE WITNESS: That's right, Your Honor.
10:36:23 10 Thank you.

10:36:25 11 MR. LANGSTON:

10:36:25 12 Q. All right. So I think you discussed sort of at
10:36:32 13 length yesterday that you don't believe Mr. Brockman
10:36:34 14 is competent to assist in this case?

10:36:37 15 A. Correct.

10:36:38 16 Q. So one of the things I want to explore is, you
10:36:41 17 know, sort of when did you come to that decision?

10:36:45 18 A. It was a gradual process. The difficulties --
10:36:54 19 my experience of the difficulties of his assisting
10:36:59 20 in the manner typical of clients and witnesses in a
10:37:05 21 document case. We began to -- I began to notice
10:37:12 22 that in probably fourth quarter of 2018.

10:37:16 23 That problem increased across the
10:37:22 24 first half of 2019. And we were not getting the
10:37:31 25 assistance from the client, as I say, that's

10:37:33 1 typical. Then there was the July meeting that I
10:37:36 2 described yesterday. And that input from the
10:37:44 3 doctors and the information about his medical
10:37:47 4 condition added to those concerns.

10:37:54 5 We researched the question of legal
10:37:57 6 competency, considered how the experience that we
10:38:03 7 had, the medical information we had bore on the
10:38:10 8 question of his competence or not. There came a
10:38:17 9 point we described yesterday where we engaged the
10:38:19 10 family to help us in support of Bob and to help him,
10:38:23 11 and we came to a decision that we needed to gather
10:38:25 12 more information on that question.

10:38:29 13 And it was not until we had
10:38:32 14 gathered that additional information I believe -- I
10:38:39 15 would say that I came to a formal, legal conclusion
10:38:45 16 that in -- late -- late 2019 or in the first quarter
10:38:52 17 of 2020 -- I'm trying to make sure I keep my years
10:38:57 18 straight here, but I believe that's the sequence.
10:39:00 19 Then I came to the conclusion that, no, he simply
10:39:02 20 couldn't understand the charges and he couldn't
10:39:04 21 assist counsel in a manner that is required.

10:39:07 22 **Q.** So you are saying late 2019, early 2020?

10:39:11 23 **A.** Yes.

10:39:11 24 **Q.** Okay. And obviously you may be more learned on
10:39:17 25 this than anyone else as to the legal conclusion,

10:39:19 1 and that you wouldn't want to reach the legal
10:39:21 2 conclusion prior to doing research, but prior to
10:39:24 3 doing all of that research had you sort of made a
10:39:26 4 factual sense, "I'm not sure this guy is going to be
10:39:29 5 able to help me the way I need"?

10:39:30 6 **A.** Yes, that had been the experience for sure.

10:39:33 7 **Q.** Is it fair to say you had that experience by
10:39:35 8 that sort of July 2019 meeting?

10:39:38 9 **A.** Yes.

10:39:38 10 **Q.** Okay. And so, by July -- at least of 2019 --
10:39:44 11 you had concerns that he might not be able; is that
10:39:49 12 fair?

10:39:49 13 **A.** Yes.

10:39:49 14 **Q.** You said when he presented you with that
10:39:53 15 finding, told you that he had dementia; is that
10:39:56 16 right?

10:39:56 17 **A.** That's the way I remember. I have to be
10:39:58 18 careful, um, because I'm not 100 percent positive.
10:40:02 19 But I -- what I recall is that he mentioned the two
10:40:06 20 diagnoses, that he had Parkinson's and that he had
10:40:09 21 dementia.

10:40:09 22 **Q.** And you said -- I think you said a light bulb
10:40:14 23 went off?

10:40:14 24 **A.** Well, it was a surprise. And immediately what
10:40:17 25 had triggered for me was a recognition and partial

10:40:21 1 explanation, perhaps, of the difficulties that we've
10:40:23 2 had. That's what I characterized as a light bulb
10:40:26 3 going on.

10:40:27 4 Q. So that meeting happened on July 18, 2019; is
10:40:30 5 that fair?

10:40:31 6 A. That sounds like the right date.

10:40:32 7 Q. Okay. So fair to say that sort of on or about
10:40:35 8 that date you had the sense that you didn't think he
10:40:37 9 was going to be able to help you the way you needed?

10:40:40 10 A. He had not -- by that -- to the point he had
10:40:43 11 not been able to help in the way that we needed.

10:40:45 12 Q. Okay. You have a lot of previous experience;
10:40:49 13 is that fair?

10:40:50 14 A. Yes.

10:40:51 15 Q. I think you said you have engaged with hundreds
10:40:53 16 of witnesses?

10:40:54 17 A. Oh, yes.

10:40:54 18 Q. Probably dozens of clients?

10:40:56 19 A. Oh, goodness. Yes.

10:40:58 20 Q. And some clients are better than others; is
10:41:01 21 that fair?

10:41:01 22 A. Well, better. Better of what --

10:41:05 23 Q. As with everything else in human performance,
10:41:08 24 there's sort of a bell curve; right? Some clients
10:41:11 25 are better assisting than others --

10:41:13 1 **A.** Yes.

10:41:13 2 **Q.** -- is that fair? Okay. And because someone

10:41:15 3 isn't on the better side, that doesn't mean they're

10:41:17 4 not competent to assist, that just means they can't

10:41:20 5 provide quite as much assistance; is that fair?

10:41:23 6 **A.** Yes.

10:41:24 7 **Q.** Do you ever have a witness lie to you?

10:41:26 8 **A.** Yes.

10:41:28 9 **Q.** Do you ever have a client lie to you?

10:41:29 10 **A.** Yes.

10:41:30 11 **Q.** Do you ever have a witness lie to you while

10:41:33 12 sitting next to their attorney?

10:41:34 13 **A.** Did I -- certainly as a prosecutor I did, yes.

10:41:41 14 **Q.** So it's fair to say you can't always take a

10:41:44 15 person at their word?

10:41:46 16 **A.** Well, you have to suspend belief, is my

10:41:50 17 expression for that. Lots of information that you

10:41:56 18 gather you simply can't accept uncritically.

10:41:58 19 **Q.** Okay. And I think you said you've worked as a

10:42:01 20 prosecutor and you've worked as a defense attorney?

10:42:03 21 **A.** Yes.

10:42:03 22 **Q.** It's fair to say there's a different role when

10:42:05 23 you are working as a prosecutor than when you are as

10:42:07 24 a defense attorney?

10:42:08 25 **A.** By all means, yes.

10:42:09 1 Q. You may have to look at things with a more
10:42:11 2 critical eye as a prosecutor than if you are an
10:42:14 3 advocate for a client; is that fair?

10:42:16 4 A. You say -- I think -- I don't -- you need to be
10:42:23 5 equally critical in considering the corroboration
10:42:27 6 and reliability of the information that you are
10:42:29 7 getting, whether you are a prosecutor or defense
10:42:31 8 lawyer.

10:42:32 9 Q. Have you -- sorry?

10:42:34 10 A. That's -- I hope that's responsive to your
10:42:37 11 question.

10:42:37 12 Q. Sure. Have you ever had a client feign an
10:42:42 13 illness?

10:42:46 14 A. Not that I recall.

10:42:48 15 Q. Okay. And so, it's fair to say that you don't
10:42:51 16 have any experience in sort of trying to detect
10:42:54 17 whether someone's feigning an illness with you; is
10:42:57 18 that fair?

10:42:58 19 A. I think that's right.

10:43:03 20 Q. Okay. I want to talk a little more about that
10:43:07 21 July 18th meeting. Mr. Brockman is the person that
10:43:11 22 presented the binder; is that fair?

10:43:12 23 A. Yes.

10:43:12 24 Q. He's the one that kind of initiated the
10:43:16 25 discussion of his health; is that fair?

10:43:18 1 **A.** Yes.

10:43:18 2 **Q.** It wasn't based on what you had noticed? You

10:43:21 3 didn't ask him to go get tested; did you?

10:43:23 4 **A.** No.

10:43:23 5 **Q.** And you didn't ask him to reach out to a

10:43:27 6 doctor; did you?

10:43:28 7 **A.** No.

10:43:28 8 **Q.** It wasn't his wife that kind of took you aside

10:43:30 9 and said, you know, "There might be a concern here"?

10:43:34 10 **A.** No.

10:43:34 11 **Q.** There wasn't a doctor that called you and said,

10:43:37 12 "There is a concern here"?

10:43:39 13 **A.** No.

10:43:39 14 **Q.** And I think you said you've never seen anyone

10:43:43 15 do this before in your career; is that right?

10:43:46 16 **A.** Right.

10:43:47 17 **Q.** That thing that you've never seen them do is

10:43:49 18 come to a meeting with a binder of materials about

10:43:52 19 their health; is that fair?

10:43:53 20 **A.** That's one of the unique things about this

10:43:56 21 case, yeah. That was a unique experience.

10:43:57 22 **Q.** All right. You said you get this binder and so

10:44:01 23 -- you know, you said you have to look critically at

10:44:04 24 it, so you wanted to check it out; is that fair?

10:44:07 25 **A.** Yes.

10:44:07 1 Q. And it took a little while, but eventually you
10:44:12 2 obtained the reports from his treating physicians?

10:44:14 3 A. Ms. Keneally did, yes.

10:44:16 4 Q. Okay. And I think you testified yesterday that
10:44:19 5 those were clinical evaluations, and so you wanted
10:44:22 6 to make sure that -- well, what you obtained were
10:44:25 7 clinical evaluations; that's fair?

10:44:27 8 A. Well, I guess so. I'm a layperson, not a
10:44:32 9 medical person, so I'm not quite sure -- to me they
10:44:35 10 were reports of his treating physicians.

10:44:36 11 Q. Okay. And so, you thought it was important to
10:44:39 12 go out and get another exam done?

10:44:43 13 A. Well, we -- we examined the legal standards for
10:44:47 14 competency and compared what we had with what we
10:44:54 15 learned would be required in order to inform a
10:44:58 16 decision legally as to competency, and we concluded
10:45:02 17 that we needed to supplement what we had in hand.

10:45:05 18 Q. Okay. Did you seek an independent forensic
10:45:10 19 expert?

10:45:10 20 A. I did not, no.

10:45:11 21 Q. Did anyone on your team, prior to the end of
10:45:15 22 2019, seek out an independent forensic expert?

10:45:19 23 A. Prior to the end of 2019? Not that I know of
10:45:23 24 or remember. I don't think that happened.

10:45:25 25 Q. In fact, you asked one of Mr. Brockman's

10:45:27 1 treating physicians to do a forensic exam; is that
10:45:31 2 fair?

10:45:31 3 **A.** Yes.

10:45:32 4 **Q.** That was Dr. York?

10:45:35 5 **A.** Once again, I defer to Ms. Keneally about that,
10:45:38 6 because she handled the details of the doctors.

10:45:40 7 But, yes, I believe that's what happened.

10:45:41 8 **Q.** So you weren't involved in the selection of
10:45:43 9 Dr. York to do a forensic exam?

10:45:46 10 **A.** Well, I -- I know I was aware at the time of
10:45:50 11 our progress and what we planned to do, because
10:45:54 12 Kathy Keneally and I were in daily communication.

10:45:58 13 **Q.** So you were aware Dr. York was one of
10:46:01 14 Mr. Brockman's treating physicians?

10:46:03 15 **A.** Yes.

10:46:04 16 **Q.** You talked a little bit yesterday about
10:46:10 17 Mrs. Brockman and the son; is that right?

10:46:13 18 **A.** Right.

10:46:14 19 **Q.** You said -- you actually had them get
10:46:16 20 additional counseling?

10:46:17 21 **A.** Yes, because I recognized as things were
10:46:22 22 progressing in this investigation that it likely
10:46:29 23 could raise questions that affected their legal
10:46:31 24 interests -- their personal legal interests,
10:46:33 25 separate from Mr. Brockman.

10:46:33 1 Q. And so, separate from Mr. Brockman they had a
10:46:39 2 stake in the outcome of this case; is that fair?

10:46:42 3 A. Well, I'm not sure it extends that far. They
10:46:45 4 had legal interests that were potentially affected,
10:46:50 5 depending on what course the investigation took.

10:46:52 6 Q. And -- and one of those legal interests was
10:46:56 7 their inheritance in this trust?

10:46:59 8 A. Well, I don't know that. Um, but I do know --
10:47:03 9 Mrs. Brockman is a discretionary beneficiary of the
10:47:07 10 trust, I believe. I can't remember what the son's
10:47:09 11 interest is or not in those respects. But
10:47:15 12 nevertheless, in as complex a situation like this we
10:47:18 13 did recognize that -- in various ways they did have
10:47:22 14 legal interests that could be affected.

10:47:23 15 Q. Okay. Some of those interests were financial
10:47:28 16 interests?

10:47:28 17 A. Yes.

10:47:29 18 Q. All right. So by July, 2019, you had -- at
10:47:32 19 least in your mind -- this belief that he couldn't
10:47:34 20 help you; that's fair?

10:47:35 21 A. That he -- that he couldn't -- well, that he
10:47:41 22 had been unable to assist in a manner I found
10:47:44 23 dispensable and commonplace with every other client
10:47:51 24 represented.

10:47:52 25 Q. He was different from any other client you

10:47:54 1 represented?

10:47:54 2 **A.** Yes.

10:47:54 3 **Q.** And I'm sure all of your clients are unique
10:47:57 4 flowers; right? But he was different in that he was
10:48:00 5 unable to assist unlike every other client that
10:48:03 6 you've had; that's fair?

10:48:04 7 **A.** Yeah.

10:48:06 8 **Q.** And you were aware, at that point in July of
10:48:07 9 2019, that he had dementia or had been diagnosed
10:48:10 10 with dementia?

10:48:11 11 **A.** Yes.

10:48:11 12 **Q.** Okay. Were you aware he was scheduled to give
10:48:13 13 a deposition in September of 2019?

10:48:17 14 **A.** I was aware at about the time of those
10:48:24 15 depositions -- I couldn't tell you what dates they
10:48:26 16 were.

10:48:27 17 **Q.** Sure.

10:48:27 18 **A.** But we -- we were generally aware that counsel
10:48:34 19 was engaging -- that he was a witness in such case,
10:48:38 20 and Reynolds's counsel was preparing him to testify.

10:48:41 21 **Q.** Okay. And it's fair to say that one of the
10:48:43 22 reasons you were kept in the loop is that any time
10:48:45 23 the subject of a criminal investigation is about to
10:48:47 24 give sworn testimony, that's a cause for concern for
10:48:51 25 his criminal attorneys; is that fair?

10:48:53 1 **A.** Yes.

10:48:53 2 **Q.** Because even though it's a civil case, it could

10:48:56 3 -- there could be admissions that could impact the

10:48:59 4 criminal case?

10:49:00 5 **A.** Well, it's a concern. Whether -- whether we

10:49:06 6 thought there was a risk of admissions, I don't

10:49:09 7 remember considering there would be a risk of

10:49:11 8 admissions, but we wanted to keep -- certainly we

10:49:16 9 wanted to keep abreast of any other legal matters

10:49:19 10 that he was involved in. We didn't participate in

10:49:22 11 his preparation or in Reynolds's counsels'

10:49:30 12 litigation of that case. We were just informed and

10:49:32 13 kept aware, and we didn't object.

10:49:35 14 **Q.** Okay. All other things being equal, you

10:49:38 15 probably prefer that he not sit for the deposition

10:49:40 16 while the criminal case -- while the criminal

10:49:41 17 investigation was ongoing?

10:49:45 18 **A.** Well, I understood enough to know that it -- it

10:49:50 19 related to Reynolds's competitor disputes. I didn't

10:49:57 20 accept that Mr. Brockman would repeatedly describe

10:50:01 21 that to us.

10:50:01 22 We didn't see any relationship

10:50:04 23 between those activities and the matters we

10:50:07 24 understood to be under investigation. So, frankly,

10:50:11 25 I had -- I had less concern than one might in other

10:50:15 1 circumstances about testifying in civil cases.

10:50:18 2 Q. You are aware that one of the issues that's
10:50:23 3 come up repeatedly in the civil case is the
10:50:25 4 ownership of Reynolds and Reynolds?

10:50:27 5 A. No, as a matter of fact I'm not aware of that.

10:50:29 6 Q. Okay. So did you read his deposition testimony
10:50:32 7 from January of 2019?

10:50:34 8 A. Did I read the -- I don't believe so.

10:50:36 9 Q. Okay. So you are not aware that he described
10:50:42 10 the ownership kind of going all the way up to the A.
10:50:48 11 Eugene Brockman Charitable Trust?

10:50:48 12 A. I don't know whether he did or not. I wouldn't
10:50:50 13 dispute that he did.

10:50:51 14 Q. It's fair to say the control and ownership of
10:50:55 15 the A. Eugene Brockman Charitable Trust is one of
10:51:00 16 the central -- one of the central disputed items in
10:51:03 17 this case?

10:51:06 18 A. Yes.

10:51:09 19 Q. And so, after the January deposition your
10:51:12 20 testimony is that you never sought to obtain a
10:51:14 21 transcript of that?

10:51:14 22 A. Oh, goodness, no. I know we got a transcript
10:51:27 23 of that deposition eventually.

10:51:28 24 Q. So Jones Day obtained it, but you haven't read
10:51:31 25 it?

10:51:31 1 **A.** Well, I -- there's also a videotape, and I -- I
10:51:36 2 looked months later at a part of the videotape. I
10:51:46 3 don't remember looking at the transcript, but I
10:51:47 4 can't rule out I did. I'm quite certain I didn't
10:51:50 5 read it through.

10:51:51 6 **Q.** Okay. And you would have remembered had he
10:51:53 7 talked -- had you read the section where he talks
10:51:56 8 about the A. Eugene Brockman charitable trust?

10:51:57 9 **A.** Well, I'm not sure I would have.

10:51:59 10 **Q.** Okay.

10:52:06 11 **Q.** I think you said you were not involved with the
10:52:08 12 civil attorneys in preparing for the deposition?

10:52:11 13 **A.** Right.

10:52:11 14 **Q.** Were you involved in preparing for the January
10:52:14 15 deposition?

10:52:14 16 **A.** No.

10:52:15 17 **Q.** Separate and apart from your -- you know,
10:52:18 18 sitting in with Sheppard Mullin for those civil
10:52:23 19 depositions, did you prepare --

10:52:25 20 MR. LOONAM: Objection to foundation.

10:52:26 21 I'm not sure that's the testimony.

10:52:29 22 MR. LANGSTON: Just said --

10:52:30 23 THE COURT: Yeah.

10:52:31 24 THE WITNESS: We did not sit in with
10:52:33 25 Sheppard Mullin for those depositions or attend,

10:52:38 1 just so we're clear on the premise. I think I
10:52:41 2 understand you, but I could have interpreted what
10:52:43 3 you said either way.

10:52:44 4 MR. LANGSTON:

10:52:44 5 Q. I'm sorry. We're on day eight. I'm not sure
10:52:47 6 that I'm --

10:52:47 7 MR. LOONAM: That's fair.

10:52:52 8 MR. LANGSTON:

10:52:52 9 Q. You did not sit in with Sheppard Mullin for the
10:52:56 10 preparation?

10:52:56 11 A. No.

10:52:56 12 Q. Separate from the preparation done by Sheppard
10:52:59 13 Mullin, did you do anything to prepare Mr. Brockman
10:53:02 14 for those depositions?

10:53:03 15 A. No.

10:53:04 16 Q. And that's the September deposition?

10:53:06 17 A. Right.

10:53:07 18 Q. And the January deposition?

10:53:08 19 A. Right. As best I remember, we didn't do
10:53:11 20 anything to prepare him for those depositions.

10:53:12 21 Q. Okay. And did you have discussions with the
10:53:17 22 civil -- with the civil attorneys that these
10:53:20 23 depositions were coming up?

10:53:21 24 A. Oh, yes, in the sense that they alerted us that
10:53:25 25 they were pending -- generally kept us abreast.

10:53:36 1 Q. Did you tell the civil attorneys Mr. Brockman
10:53:38 2 had been diagnosed with dementia?

10:53:39 3 A. No.

10:53:40 4 Q. Why not?

10:53:41 5 A. Because it was a confidential communication of
10:53:44 6 our client to us. Part of of that discussion was he
10:53:50 7 wanted this closely held, did not authorize us to
10:53:54 8 disclose it elsewhere. We respected that.

10:54:00 9 Q. So if I understand that, Mr. Brockman told you
10:54:05 10 that he had dementia in July of 2019?

10:54:07 11 A. As -- as -- as best I remember, he mentioned it
10:54:11 12 at the meeting and we read about that in the
10:54:12 13 reports.

10:54:12 14 Q. Okay. But at least between July and September
10:54:16 15 when this deposition had -- he wanted that
10:54:18 16 information closely held?

10:54:19 17 A. Yes.

10:54:19 18 Q. He wanted it held just within the criminal
10:54:21 19 team?

10:54:22 20 A. Well, he told -- he told us, and asked us not
10:54:25 21 to share with others.

10:54:27 22 Q. Okay. And did you and the attorneys from
10:54:30 23 Sheppard Mullin have any discussion of his cognitive
10:54:33 24 abilities?

10:54:34 25 A. I don't recall that we did.

10:54:38 1 Q. Did they raise any concerns with you?

10:54:40 2 A. I don't recall that they did.

10:54:42 3 Q. Okay. Are you aware that the Defendant was

10:54:50 4 scheduled to testify in an arbitration in 2021?

10:54:55 5 A. That Mr. Brockman was?

10:54:57 6 Q. Yeah.

10:54:59 7 A. Scheduled to testify -- I can't say that I

10:55:01 8 remember that. I remember there was an arbitration

10:55:04 9 where his testimony was sought --

10:55:05 10 Q. And, in fact --

10:55:06 11 A. -- but I don't know it ever actually got

10:55:09 12 scheduled.

10:55:09 13 Q. In fact, it was ordered by the arbitrator that

10:55:12 14 he sit for a deposition --

10:55:14 15 A. Well, I -- I don't remember that, but I'll

10:55:16 16 accept it if that's --

10:55:17 17 Q. -- okay. And Jones Day actually blocked him

10:55:20 18 from testifying?

10:55:21 19 A. Well, we objected to that -- to that

10:55:24 20 deposition. We didn't think it was authorized by

10:55:26 21 law, and that they weren't entitled to get it.

10:55:30 22 Q. And despite the arbitrator ordering him -- the

10:55:33 23 arbitrator overruled your objection?

10:55:35 24 A. I don't remember the disposition of that, nor

10:55:39 25 whether the arbitrator had jurisdiction over us to

10:55:42 1 order one way or another.

10:55:43 2 Q. Well, setting aside your belief as to the
10:55:45 3 arbitrator's jurisdiction, do you remember whether
10:55:49 4 the arbitrator ordered him to sit for the
10:55:51 5 deposition?

10:55:51 6 A. I don't remember.

10:55:52 7 Q. Okay. And you don't remember whether Jones Day
10:55:56 8 blocked it in part because of his health?

10:55:59 9 A. I know we -- we objected to that -- to such a
10:56:03 10 deposition. What the steps were and how those
10:56:08 11 objections were expressed -- I just don't remember.

10:56:11 12 Q. I think one of the concerns you had was that
10:56:25 13 Mr. Brockman was consistently unable to review and
10:56:29 14 evaluate documents; is that fair?

10:56:31 15 A. Right. Right. Especially -- and this -- this
10:56:34 16 was a problem that progressed and got worse, so
10:56:37 17 especially by -- you know, as -- as time advanced
10:56:40 18 that was -- that was the case.

10:56:42 19 Q. Okay. But -- but by July of 2019, that was
10:56:46 20 already an issue; is that fair?

10:56:47 21 A. Yes. Yes.

10:56:48 22 Q. And I'm going to show you what I'll mark -- or
10:56:53 23 what is already marked as 115. I'll hand the
10:57:04 24 witness a copy of 115. This is an e-mail from
10:57:15 25 Mr. Brockman to his accountant, Don Passmore in

10:57:20 1 October of 2018; is that fair?

10:57:22 2 **A.** The top page of this string of this, yes.

10:57:25 3 **Q.** And Mr. Brockman is discussing the history of

10:57:29 4 his investment in something called, "the GOOSE

10:57:32 5 group"?

10:57:33 6 **A.** Well, would you like me to pause to read it?

10:57:35 7 **Q.** Sure. Go ahead.

10:58:02 8 **A.** Okay. I've read it, yes.

10:58:06 9 **Q.** Okay. To be fair, you haven't seen this e-mail

10:58:09 10 before today?

10:58:09 11 **A.** I don't believe I've ever seen this.

10:58:11 12 **Q.** Okay. Was this -- is this e-mail consistent

10:58:13 13 with your experience of Mr. Brockman in October of

10:58:16 14 2019?

10:58:19 15 **A.** I -- I'm struggling with consistent. I don't

10:58:24 16 think I have an opinion as to whether it was

10:58:27 17 consistent or inconsistent.

10:58:27 18 **Q.** All right. I think you were saying

10:58:31 19 Mr. Brockman was struggling to recall information;

10:58:33 20 is that fair?

10:58:34 21 **A.** Yes, that was a part of it.

10:58:36 22 **Q.** And he had difficulty with sort of task

10:58:39 23 initiation? He was a little apathetic in the -- in

10:58:43 24 your representation of him?

10:58:45 25 **A.** Apathetic? Task initiation? Over time, he

10:58:51 1 became more and more weak physically and would tire
10:58:59 2 over the course of the day.

10:59:01 3 Q. And he sort of would fall back on generalities
10:59:05 4 I think you said?

10:59:05 5 A. Yes.

10:59:06 6 Q. And had difficulty offering specifics?

10:59:08 7 A. Yes.

10:59:10 8 Q. Guess what I'm asking is this e-mail consistent
10:59:13 9 with -- with those things -- things that you
10:59:15 10 testified to?

10:59:16 11 A. Well, I have a hard time saying consistent or
10:59:24 12 inconsistent. There are details in here, to be
10:59:26 13 sure. We did -- I had not heard the Jones School
10:59:30 14 Business Plan Competition, or GOOSE, or this
10:59:34 15 activity, so this is unfamiliar to me.

10:59:36 16 Q. Okay.

10:59:37 17 MR. LANGSTON: I'll offer 115.

10:59:39 18 MR. LOONAM: No objection.

10:59:40 19 THE COURT: Okay. Without objection,
10:59:41 20 115 is admitted.

10:59:43 21 MR. LANGSTON:

10:59:43 22 Q. I'm going to show the witness what's in
10:59:54 23 evidence as Government's Exhibit 69. This is an
11:00:17 24 e-mail from Mr. Brockman to a number of executives
11:00:19 25 at Reynolds and Reynolds in May of 2020?

11:00:23 1 **A.** On its face that's what it is, yes.
11:00:26 2 **Q.** Okay. And you can go ahead and read this.
11:00:31 3 Then my question for you is going to be the same.
11:00:34 4 Was that consistent with your experience of
11:00:36 5 Mr. Brockman in May of 2020?

11:00:44 6 **A.** This -- this is consistent in one important
11:01:09 7 sense. Mr. Brockman had at his fingerprints, and
11:01:15 8 would often divert conversations of ours into
11:01:18 9 Reynolds and Reynolds's operations to describe the
11:01:23 10 products, to describe marketing and customer
11:01:27 11 relations, sales.

11:01:30 12 Um, he -- he was very adept and
11:01:35 13 knowledgeable about Reynolds and Reynolds's
11:01:38 14 operations, and that's what I -- how I would
11:01:40 15 characterize what we have here. He's talking about
11:01:43 16 the profitability or unprofitability of a particular
11:01:50 17 product it seems.

11:01:50 18 **Q.** Okay. And -- and let's clarify for a second.
11:01:53 19 I think you said he's very adept at discussing
11:01:56 20 Reynolds and Reynolds's business?

11:01:57 21 **A.** Yes.

11:01:58 22 **Q.** And his ownership of the company has gone back
11:02:02 23 40 years?

11:02:02 24 **A.** Well, the -- the trust through a chain of
11:02:05 25 entities --

11:02:05 1 Q. Ownership is a tricky word. His involvement in
11:02:09 2 the company has gone back 40 years?

11:02:11 3 A. Yes.

11:02:11 4 Q. And --

11:02:12 5 A. And Reynolds and predecessor companies, yes.

11:02:15 6 Q. Okay. And he could give you a history going
11:02:18 7 back to the day he founded it in his garage; right?

11:02:21 8 A. I think it was on the living room sofa.

11:02:23 9 Q. Okay. So going back to the living room sofa,
11:02:25 10 he can give you the history of going all the way
11:02:28 11 back to that day?

11:02:29 12 MR. LOONAM: Objection, insofar as
11:02:31 13 requesting a time frame.

11:02:32 14 MR. LANGSTON: I think that's what
11:02:33 15 we're doing right now.

11:02:34 16 THE COURT: I think he wants a
11:02:35 17 timeframe as when does he think that he could do
11:02:37 18 that.

11:02:37 19 MR. LANGSTON: Oh, I got you.

11:02:39 20 THE COURT: I mean, you are saying he
11:02:40 21 could do that. Can he do it now? Can he -- at what
11:02:43 22 point in time I think is what Mr. Loonam is saying.

11:02:47 23 MR. LANGSTON:

11:02:48 24 Q. Okay. Let's go to February of 2020, which is
11:02:49 25 the last time that you met with him?

11:02:51 1 **A.** Yes.

11:02:51 2 **Q.** In February of 2020, was he able to give you
11:02:53 3 the history of Reynolds and Reynolds?

11:02:55 4 **A.** Well, as I said, the history -- he would give
11:02:57 5 us and repeat colorful anecdotes that described
11:03:03 6 milestones in the history of the company, you know.
11:03:06 7 And he would do that and often would repeat those
11:03:09 8 anecdotes.

11:03:10 9 I can't remember that we heard it
11:03:12 10 again in February of 2020, but, yes. Throughout we
11:03:17 11 -- he could, um, explain that colorful history in
11:03:23 12 anecdotal terms.

11:03:24 13 **Q.** Okay. I think that there's been a lot of -- a
11:03:28 14 lot of medical discussion you've been lucky enough
11:03:30 15 not to have to sit through about the difference sort
11:03:35 16 of between short-term memory and sort of long-term
11:03:39 17 memory.

11:03:39 18 **A.** I'll accept that. I didn't hear it.

11:03:41 19 **Q.** Okay. So the question I want to ask you is
11:03:43 20 these discussions that you would have with him about
11:03:46 21 Reynolds and Reynolds -- and again, we'll take this
11:03:48 22 up until February of 2020 -- was he able to discuss
11:03:52 23 recent events that had occurred at Reynolds and
11:03:58 24 Reynolds?

11:03:58 25 **A.** Well, we certainly heard a lot about the CDK

11:04:02 1 competitive dispute. I don't know how recent or
11:04:04 2 remote in time that was.

11:04:09 3 Q. Well the antitrust matter was ongoing at late
11:04:12 4 as of the deposition of September of 2019; right?

11:04:15 5 A. So I see, yes.

11:04:17 6 Q. Okay.

11:04:17 7 A. But the underlying dispute, I don't know quite
11:04:20 8 when that happened, but we heard a lot about that.

11:04:22 9 Q. But he was still the CEO in February of 2020;
11:04:25 10 is that fair?

11:04:26 11 A. I believe that's right.

11:04:26 12 Q. Okay. Was he able to discuss with you things
11:04:28 13 that were happening that month at Reynolds and
11:04:31 14 Reynolds?

11:04:31 15 A. I can't recall the February meetings in
11:04:34 16 sufficient detail to remember whether or not we
11:04:37 17 heard about Reynolds's business in February of 2020.

11:04:40 18 Q. Okay. So in February of 2020, you can't
11:04:43 19 remember whether he was able to discuss recent
11:04:45 20 events; is that fair?

11:04:46 21 A. Whether he was able -- I don't remember whether
11:04:48 22 we did or did not. I don't remember the specific
11:04:51 23 discussions in February.

11:04:51 24 Q. How about in any of your meetings prior to
11:04:53 25 February of 2020?

11:04:55 1 **A.** Okay. Prior meetings and -- the question is
11:04:58 2 what?

11:04:58 3 **Q.** The question is could he discuss events that
11:05:00 4 happened that month or were -- the discussions about
11:05:03 5 Reynolds's things that happened far in the past?

11:05:09 6 **A.** I have to think about that. Sometimes we heard
11:05:17 7 -- it was difficult to understand whether or not you
11:05:19 8 were hearing about something that was current,
11:05:23 9 because it wasn't tied to a timeframe. We'd hear
11:05:29 10 about sales, and sales technique, and auto dealers
11:05:35 11 as customers -- what tough negotiators car dealers
11:05:41 12 are. Looking back, I can't remember whether that
11:05:43 13 was prompted, or in the context of some recent event
11:05:46 14 at Reynolds, or this was just something on his mind
11:05:48 15 from, you know, more distant events.

11:05:52 16 **Q.** Okay. So I'll turn your attention back to
11:05:54 17 Exhibit 69. This is discussing an ongoing decision
11:05:59 18 -- a decision being made in May of 2020; do you
11:06:03 19 understand that?

11:06:03 20 **A.** My copy's not marked. Is this the one
11:06:07 21 Bates Number 8695?

11:06:09 22 **Q.** Yes.

11:06:10 23 **A.** Okay. I'm with you.

11:06:11 24 **Q.** It's discussing something that's happening in
11:06:13 25 May of 2020 -- in fact, in the present.

11:06:22 1 **A.** It appears to be something contemporaneous.

11:06:26 2 **Q.** Okay. So based on your experiences with

11:06:29 3 Mr. Brockman, by May of 2020 did you believe he was

11:06:34 4 able to discuss contemporaneous events?

11:06:38 5 **A.** I'm sorry, could you repeat the question?

11:06:39 6 **Q.** Sure. I'm now taking you forward from

11:06:44 7 February 2020, to May 2020 when this was written.

11:06:48 8 **A.** Okay.

11:06:48 9 **Q.** Based on your discussions and experiences with

11:06:50 10 Mr. Brockman in May of 2020, did you believe he

11:06:54 11 could discuss contemporaneous events?

11:06:58 12 **A.** I -- I'm quite sure that in May of 2020, I

11:07:02 13 never asked myself that question.

11:07:03 14 **Q.** Okay.

11:07:14 15 **A.** And I might add -- I mean, I was not aware

11:07:16 16 until you showed me of this e-mail of this activity

11:07:18 17 that it describes. I had no awareness of any of

11:07:22 18 this.

11:07:22 19 **Q.** Okay. Fair to say you didn't have any

11:07:24 20 awareness of how he was running the company at all?

11:07:28 21 **A.** Well, that may overstate it.

11:07:30 22 **Q.** Might overstate it?

11:07:31 23 **A.** But I certainly didn't know of activities at

11:07:35 24 this level of detail, no.

11:07:37 25 **Q.** So you were unaware that he was engaged in

11:07:39 1 activities in this level of detail in May of 2020;
11:07:43 2 is that your testimony?

11:07:43 3 **A.** I don't say that I -- that I was not aware that
11:07:47 4 he was engaged. I was saying I was not aware of
11:07:51 5 such details.

11:07:52 6 **Q.** Okay. You weren't aware of any of the e-mails
11:07:55 7 he was sending from his Reynolds and Reynolds's
11:07:59 8 e-mail account throughout 2020?

11:08:01 9 **A.** Well, throughout 2020, I can't say I never saw
11:08:04 10 one. He may have sent some to me for that matter.

11:08:06 11 **Q.** But not e-mails sent to you, e-mails he was
11:08:09 12 sending to other people. He wasn't sharing those
11:08:11 13 with you?

11:08:12 14 **A.** Unless you see me copied on an e-mail, he
11:08:15 15 wasn't sharing those e-mails with me.

11:08:16 16 **Q.** Okay. So fair to say you were not aware of the
11:08:20 17 quality, or lack of quality, of the e-mails he was
11:08:23 18 sending from Reynolds in 2020?

11:08:27 19 **A.** Right.

11:08:28 20 **Q.** And so, that did not play a role in your belief
11:08:33 21 that he was not capable of assisting you in trying
11:08:37 22 this case; is that fair?

11:08:39 23 **A.** No, his -- my opinion was based on my
11:08:43 24 experience of him, and doing what we needed to do to
11:08:46 25 engage his assistance and prepare a defense.

11:08:49 1 Q. Okay. And I think you talked about, you know,
11:08:53 2 he's able to recall sort of different milestones in
11:08:59 3 Reynolds and Reynolds and before that UCSH?
11:09:01 4 A. Yes.
11:09:02 5 Q. And going back to -- I think you said on the
11:09:06 6 living room couch, you know, 40 or 50 years
11:09:08 7 previously; is that fair?
11:09:09 8 A. Yes.
11:09:09 9 Q. And was he able to similarly recall the
11:09:13 10 milestones with respect to the offshore structures?
11:09:19 11 A. That's a very broad question, and it starts to
11:09:28 12 poach on privileged communications. But if one were
11:09:31 13 to answer, the answer would be no.
11:09:33 14 Q. Okay. So he can recall Reynolds and Reynolds's
11:09:36 15 business going back 50 years, but not trust business
11:09:38 16 going back 40 years; is that fair?
11:09:42 17 A. What we got, all the way back to the founding
11:09:46 18 of the related company, were anecdotes in the
11:09:49 19 history of the company, not -- we got detail as to
11:09:56 20 Reynolds's operations, you know, over the last -- I
11:10:01 21 don't know -- seemed to be 10 to 20 years. Um, what
11:10:08 22 we were trying to accomplish in our inquiry was to
11:10:14 23 drill down in very specific raw material, and he was
11:10:23 24 not able to assist in that process I described.
11:10:26 25 Q. Okay. We've all seen deposition testimony

11:10:28 1 where he is drilling down in pretty substantial
11:10:31 2 detail with respect to Reynolds and Reynolds's
11:10:36 3 business. Was he able to do that with respect to
11:10:39 4 trust business?

11:10:44 5 **A.** With respect to trust business? Um, I don't --
11:10:52 6 I don't think -- I'm struggling with what -- what
11:10:58 7 one would regard as trust business, and also
11:11:06 8 questions of -- of privilege.

11:11:10 9 He was not -- he was -- he was far
11:11:13 10 more facile and adept at describing matters related
11:11:21 11 to Reynolds's operations, if you want a comparison.

11:11:27 12 **Q.** So far more adept at discussing the Reynolds
11:11:31 13 and Reynolds's business than he was at discussing
11:11:34 14 the matter at interest in the criminal case; is that
11:11:38 15 fair?

11:11:38 16 **A.** Yes.

11:11:47 17 **Q.** All right. In April of 2020, you -- you were
11:11:51 18 involved in writing a letter to the Department of
11:11:54 19 Justice in anticipation of what's called a taxpayer
11:11:57 20 conference?

11:11:57 21 **A.** Yes.

11:11:58 22 **Q.** And this is in evidence as Government's
11:12:09 23 Exhibit 81 --

11:12:11 24 MR. LOONAM: The letter?

11:12:12 25 MR. LANGSTON: Judge, would you like a

11:12:14 1 copy of it --

11:12:14 2 THE COURT: Sure. Sure.

11:12:21 3 MR. LANGSTON: Handing a copy of 81 to

11:12:23 4 the witness.

11:12:30 5 MR. LOONAM: This is without exhibits?

11:12:32 6 MR. LANGSTON: I think the exhibits are

11:12:33 7 82.

11:12:34 8 MR. LOONAM: Okay.

11:12:36 9 MR. LANGSTON:

11:12:37 10 Q. Okay. And this is the letter that you were

11:12:39 11 involved in writing to the Government on April 9,

11:12:42 12 2020?

11:12:43 13 A. Correct.

11:12:44 14 Q. Okay. If we turn to the last page, you are on

11:12:48 15 the signature block?

11:12:50 16 A. Am I? Let me look. Um, yes. Listed names --

11:12:58 17 signed manually by Kathy Keneally, but lists three

11:13:02 18 of us.

11:13:03 19 Q. Okay. But you agreed with the information

11:13:05 20 written in this letter; is that fair?

11:13:06 21 A. Yes. Not -- haven't read it in quite some

11:13:09 22 time, but I know I reviewed it carefully and agreed

11:13:14 23 with it at the time we sent it forward.

11:13:16 24 Q. Okay. So April 9th of 2020, you had read the

11:13:18 25 entire letter?

11:13:19 1 **A.** Yes.

11:13:19 2 **Q.** And you had agreed with every word written in

11:13:22 3 it; is that fair?

11:13:23 4 **A.** I'm confident I did.

11:13:25 5 **Q.** Okay. Did you include all of the relevant

11:13:27 6 facts in this letter?

11:13:29 7 **A.** Oh, goodness. Um, I can't imagine that we did,

11:13:44 8 but I can't -- I can't cite to you -- I haven't

11:13:47 9 re-read the letter. I can't -- I haven't then

11:13:49 10 searched my memory to compare detail that was not

11:13:52 11 included here, but, um, I'm sure that there -- there

11:13:56 12 was additional detail, um, beyond what made it into

11:14:04 13 even a 17-page letter.

11:14:05 14 **Q.** Okay. And just -- I think one of the things

11:14:08 15 I'm trying to understand is, is this an exercise in

11:14:12 16 advocacy where you're only highlighting the good

11:14:14 17 facts, or are you trying to lay out the true case

11:14:18 18 for the Government?

11:14:19 19 **A.** I didn't think in either of those terms. It

11:14:21 20 was -- it was an effort to bring to the Government's

11:14:25 21 attention, um, the medical history that we'd

11:14:32 22 learned, our conclusion about the legal consequence

11:14:34 23 of that, and to try to engage the Government in --

11:14:37 24 in a parallel, if you will, inquiry on their part to

11:14:42 25 vet that information and reach their own

11:14:46 1 conclusions, um, and to weigh it in considering a
11:14:51 2 charging decision or how the matter ought to be
11:14:56 3 disposed of.

11:14:56 4 Q. It's fair to say one of the things you were
11:14:58 5 trying to do is convince the Government not to
11:15:01 6 indict Mr. Brockman?

11:15:02 7 A. Yes.

11:15:02 8 Q. And so this letter was in service of convincing
11:15:07 9 the Government of that?

11:15:08 10 A. Yes.

11:15:08 11 Q. And I think you said you were trying to kind of
11:15:11 12 engage the Government in a dialogue?

11:15:13 13 A. Yes.

11:15:13 14 Q. And so, you made sure to include all of the
11:15:18 15 good facts and all of the bad facts; is that fair?

11:15:21 16 A. Well, we -- we certainly intended to present a
11:15:28 17 balanced, candid view of the situation, um, that we
11:15:36 18 hoped would persuade them to join us in the course I
11:15:38 19 just described.

11:15:40 20 Q. And so, did you deliberately leave out any bad
11:15:44 21 facts?

11:15:45 22 A. Not that I remember.

11:15:46 23 Q. Okay. When did you decide to write this
11:15:48 24 letter?

11:15:50 25 A. I can't pinpoint a decision date. I mean, it

11:15:55 1 was under consideration for at least a matter of
11:15:58 2 weeks before the letter went forward.

11:16:01 3 Q. And I imagine this probably was not the final
11:16:03 4 draft -- or this was not the only draft?

11:16:06 5 A. Oh, goodness, no. I know that it went through
11:16:11 6 numerous drafts.

11:16:12 7 Q. Okay. And the -- as part of the exhibits for
11:16:19 8 this, there are letters in January of 2020 from
11:16:24 9 Doctors Jankovic and Dr. Pool?

11:16:28 10 A. I don't remember, but I accept that if that's
11:16:30 11 what the letter shows.

11:16:30 12 Q. Okay. Is it fair to say that you contemplated
11:16:33 13 writing this letter prior to soliciting those
11:16:36 14 letters from his doctors?

11:16:38 15 A. I can't remember.

11:16:40 16 Q. Okay.

11:16:40 17 A. First of all, I don't have the additional
11:16:42 18 letters that you are talking about in front of me,
11:16:46 19 and so I can't remember the sequence of
11:16:50 20 decision-making over when to send the letter, and
11:16:52 21 get those letters and so on.

11:16:54 22 Q. Okay. And so I will hand you, um, 82, which is
11:17:01 23 in evidence. I'm going to turn you to Exhibit F.
11:17:14 24 That's one of the letters; isn't it?

11:17:20 25 A. I don't know. I have to go through this. I

11:17:22 1 accept it, if that's what you tell me it is.

11:17:24 2 Q. Okay. Well, these are the attachments you sent

11:17:26 3 to the Department of Justice; is that fair?

11:17:30 4 A. I can't say specifically I recognize it as

11:17:32 5 such, but I accept it if that's what you tell me

11:17:35 6 what the record shows.

11:17:36 7 Q. Okay. And the first paragraph of this says, "I

11:17:41 8 have been asked to provide this letter by counsel

11:17:42 9 for Robert T. Brockman. I understand that this

11:17:46 10 letter will be included by counsel as part of a

11:17:48 11 submission to the US Department of Justice on the

11:17:51 12 issue of Mr. Brockman's cognitive impairment"?

11:17:55 13 A. Yes, that's what it says.

11:17:57 14 Q. Okay. That's in January of 2020?

11:17:59 15 A. Correct.

11:17:59 16 Q. So fair to say at least by January of 2020, you

11:18:03 17 are contemplating this?

11:18:04 18 A. Yes.

11:18:04 19 Q. And obviously the January 2020 -- when the

11:18:13 20 letter was written would have to be solicited prior

11:18:15 21 to that; is that fair?

11:18:16 22 A. Correct.

11:18:16 23 Q. And so, it's prior to the solicitation of these

11:18:19 24 letters that you believed you were going to make a

11:18:22 25 submission to the -- to the US Government; is that

11:18:26 1 fair?

11:18:26 2 **A.** Yes.

11:18:26 3 **Q.** Was it prior to the December exam by Dr. York?

11:18:30 4 **A.** Well, we -- we had in mind that that's where

11:18:33 5 all of this might lead, but I don't believe there

11:18:41 6 was a decision made finally to go forward in this

11:18:44 7 fashion until we had all of the evidence in hand.

11:18:46 8 **Q.** Okay. Let's turn back to 81.

11:18:57 9 **A.** I'm sorry, Counsel. My copies aren't numbered.

11:19:00 10 Do you want me to look at 81?

11:19:02 11 **Q.** Yes.

11:19:04 12 **A.** Which is that?

11:19:05 13 **Q.** We'll go to -- that's the letter.

11:19:08 14 **A.** The April 9th letter itself?

11:19:10 15 **Q.** Yes.

11:19:10 16 **A.** Okay.

11:19:13 17 **Q.** And I'll turn your attention to Page 2. And

11:19:22 18 I'm looking at the third full paragraph/fourth

11:19:27 19 paragraph down starting with, "Mr. Brockman can no

11:19:30 20 longer..."

11:19:32 21 **A.** Yes.

11:19:32 22 **Q.** So you say that, "Mr. Brockman also can no

11:19:36 23 longer effectively serve as the chief executive

11:19:39 24 officer of Reynolds and Reynolds."

11:19:43 25 Did you believe that to be true in

11:19:45 1 April of 2020?

11:19:46 2 **A.** Yes, I did.

11:19:48 3 **Q.** Okay. And when did you come to the conclusion
11:19:51 4 that he could no longer effectively serve as the CEO
11:19:55 5 of Reynolds and Reynolds?

11:19:58 6 **A.** Well, I can't remember when I came to that
11:20:00 7 conclusion, but it was related to my own experience
11:20:05 8 about his ability to assist us in the case, and to
11:20:13 9 the decision of gathering such information to come
11:20:15 10 forward to the Department of Justice.

11:20:17 11 As we gathered all of that
11:20:19 12 information and learned this, um, it occurred to me
11:20:23 13 that his -- his difficulties would likewise impair
11:20:28 14 his ability to serve effectively as CEO of the
11:20:32 15 company.

11:20:32 16 **Q.** Okay. How about in February of 2020, the last
11:20:35 17 time you saw him do you think he could have served
11:20:38 18 effectively, based on what you knew in February of
11:20:40 19 2020?

11:20:40 20 **A.** Well, see, I'm struggling when you try to
11:20:43 21 pinpoint it to a specific time or even month. I
11:20:48 22 don't remember the February meeting, in particular.
11:20:50 23 As I sit here, I can't recall what -- what we
11:20:53 24 discussed or his appearance, except that -- that it
11:20:57 25 was consistent that over time and over a period his

11:21:02 1 physical condition deteriorated. I don't remember
11:21:08 2 asking myself that question in February of 2020,
11:21:10 3 so... .

11:21:10 4 Q. Okay. Let's do it this way. You said in the
11:21:13 5 fourth quarter of 2019, you were convinced that he
11:21:16 6 could not assist in his defense?

11:21:22 7 A. I was convinced, and my experience had been he
11:21:25 8 was unable to assist in the way typical of other
11:21:29 9 clients and that the question was -- likely rose to
11:21:38 10 the level of incompetence of the legal standard.

11:21:41 11 Q. I want to make sure we're using the same
11:21:43 12 definitions here. Do you believe that a person who
11:21:45 13 is unable to assist in their criminal defense is
11:21:48 14 capable of running a 5,000-employee company?

11:21:53 15 A. Maybe. I -- I don't know that the -- the tests
11:21:58 16 are identical.

11:22:01 17 Q. Okay.

11:22:01 18 A. Well --

11:22:03 19 Q. So when you say -- and -- and -- and that may
11:22:06 20 be your testimony. So when you say that you don't
11:22:08 21 believe that Mr. Brockman can assist in his defense,
11:22:12 22 you think it could be possible, however, for him to
11:22:15 23 continue to run Reynolds and Reynolds?

11:22:18 24 A. Well, what sticks in my mind, Counsel -- I've
11:22:21 25 heard from doctors in the course of what we've all

11:22:23 1 learned in this process -- an anecdote about a
11:22:27 2 skilled surgeon thoroughly demented who can
11:22:31 3 nevertheless conduct brain surgery. And that
11:22:33 4 baffles me, but I heard that described that certain
11:22:38 5 -- especially highly-skilled, intelligent people who
11:22:42 6 have done one thing for a long, long time, even as
11:22:46 7 they deteriorate mentally into severe dementia are
11:22:51 8 nevertheless capable -- some of them -- at doing
11:22:54 9 highly-skilled things.

11:22:56 10 THE COURT: One second --

11:22:59 11 MR. LANGSTON:

11:23:00 12 Q. When did you hear that fact?

11:23:01 13 A. Somewhere in the course of preparation in our
11:23:05 14 learning and study for this hearing.

11:23:09 15 Q. Was it in the last two weeks?

11:23:12 16 A. It was longer ago than that.

11:23:13 17 Q. Okay. So you met with the experts in this
11:23:19 18 case?

11:23:19 19 A. No -- well, I did a couple of times recently.

11:23:22 20 MR. LOONAM: I just want to -- so -- I
11:23:24 21 mean, I want to -- I don't want to impede on the
11:23:27 22 cross. I don't want to use privilege as a sword and
11:23:31 23 shield.

11:23:33 24 THE COURT: Right. It's okay. You can

11:23:35 25 --

11:23:36 1 MR. LOONAM: Work product.
11:23:37 2 THE COURT: Right. You can't talk
11:23:38 3 about what Mr. Romatowski talked about with the
11:23:42 4 expert. The problem is that's not what the expert
11:23:47 5 testified to in court. I wrote it down. It wasn't
11:23:49 6 just what -- what the witness said isn't exactly the
11:23:54 7 way the expert testified to.

11:23:57 8 So -- I mean, I think the most you
11:24:04 9 can get is that he talked to the expert, and that's
11:24:08 10 pretty much it. As far as the contents, I'm
11:24:11 11 concerned that it gets into work product, even
11:24:15 12 though the -- even though the expert's testimony is
11:24:20 13 not privileged, the question.

11:24:26 14 MR. LANGSTON: I did stop on that one,
11:24:28 15 Your Honor.

11:24:28 16 THE COURT: Okay.
11:24:28 17 MR. LOONAM: Also a foundational issue.
11:24:30 18 It's possible Mr. Romatowski may have heard that
11:24:34 19 anecdote from me, just to clear this up.

11:24:37 20 MR. LANGSTON: I just want to be sure
11:24:39 21 hadn't violated --

11:24:40 22 THE COURT: Okay. That -- I bet you he
11:24:43 23 hadn't, but you can go down that road.

11:24:45 24 MR. LANGSTON: Okay.

11:24:46 25 Q. All right. So I think we were saying -- so

11:24:49 1 based on this -- maybe based on this anecdote, maybe
11:24:52 2 not, you believe that a person who was not competent
11:24:57 3 to stand trial could continue to run a multibillion
11:25:03 4 dollar software company?

11:25:04 5 **A.** I'm saying I can't rule that out. I don't know
11:25:07 6 that incompetence -- in the sense it's important to
11:25:09 7 me in a criminal case -- means incompetence in other
11:25:14 8 realms.

11:25:14 9 **Q.** Okay. And so -- so when you say that someone
11:25:17 10 is incompetent in a criminal case, you are not
11:25:19 11 ruling out that they could have this ability to run
11:25:22 12 a 5,000-person software company?

11:25:24 13 **A.** No, I'm not, but I just don't know.

11:25:26 14 **Q.** Okay. And you were aware that he -- well, let
11:25:31 15 me ask you this. So you -- you are saying that you
11:25:34 16 can't rule that out as of the fourth quarter of
11:25:38 17 2019; is that fair?

11:25:39 18 **A.** Yes.

11:25:39 19 **Q.** Okay. But by April of 2020, you have ruled
11:25:42 20 that out?

11:25:43 21 **A.** Well, I worried that he was -- that he was not
11:25:46 22 capable. I -- I -- what I had seen of what he was
11:25:51 23 able to do mentally did make me concerned that he
11:25:57 24 was unable to perform fully and adequately as CEO of
11:26:06 25 Reynolds.

11:26:06 1 Q. That's based on when you were observing him in
11:26:10 2 your meetings with him?

11:26:11 3 A. Yes.

11:26:12 4 Q. And based on your phone calls with him?

11:26:14 5 A. Right. My layman's observations, yes.

11:26:17 6 Q. So based on your layman's observations of
11:26:21 7 Mr. Brockman, you didn't believe that he could
11:26:23 8 continue to effectively serve as CEO of Reynolds and
11:26:26 9 Reynolds?

11:26:26 10 A. Right, I was concerned that he wasn't capable.

11:26:29 11 Q. Okay. Are you aware he did continue to serve
11:26:34 12 as CEO of Reynolds and Reynolds?

11:26:35 13 A. Yes, for a time.

11:26:36 14 Q. In fact, until after his indictment in this
11:26:39 15 case?

11:26:39 16 A. I think it was not until after, yes.

11:26:42 17 Q. So six months after you wrote this letter?

11:26:45 18 A. That's -- yes, what the calendar shows, yes.

11:26:47 19 Q. Okay. Are you aware that Mr. Brockman chose a
11:26:52 20 successor?

11:26:53 21 A. Yes.

11:26:53 22 Q. Are you aware he continued signing board
11:26:56 23 resolutions?

11:26:58 24 A. Was I -- I probably was aware of that, yes.

11:27:00 25 Q. Are you aware that he continued to weigh in on

11:27:04 1 executive matters?

11:27:09 2 **A.** Yes. Stated broadly, I think that's right,
11:27:13 3 yes.

11:27:13 4 **Q.** Are you aware that he continued to be involved
11:27:15 5 in every major decision at Reynolds and Reynolds?

11:27:18 6 **A.** Well, every -- I can't go that far. I don't
11:27:24 7 know every major decision of Reynolds's in the
11:27:27 8 period, so I just don't know.

11:27:28 9 **Q.** Did you read Mr. Barris's deposition testimony
11:27:31 10 in this case?

11:27:32 11 **A.** No.

11:27:32 12 **Q.** Okay. Here in the second -- or sorry, the
11:27:40 13 final paragraph, of 81 you indicate --

11:27:45 14 **A.** Is 81 one the April 9th letter?

11:27:48 15 **Q.** Yes. 81, Page 2, the final paragraph. You
11:27:59 16 indicate that Mr. Brockman will shortly step down as
11:28:02 17 CEO and Chair?

11:28:05 18 **A.** Yes, of -- in the final, partial paragraph,
11:28:09 19 yes.

11:28:11 20 **Q.** And he didn't actually step down as CEO and
11:28:15 21 Chair?

11:28:16 22 **A.** Well, eventually he did. It took longer than
11:28:19 23 we all hoped.

11:28:20 24 **Q.** And when you say it took longer than you hoped,
11:28:23 25 is that because you understand that Mr. Brockman not

11:28:26 1 stepping down certainly hurts your case that he's
11:28:29 2 incompetent?

11:28:37 3 **A.** That was down a list of concerns, yes. But --
11:28:40 4 but, yes, it -- I acknowledge that his continuation
11:28:45 5 in the role is a puzzle in view of the -- our
11:28:53 6 observation that he wasn't competent in other
11:28:55 7 respects, yes.

11:29:06 8 **Q.** In fact, during the tax payer conference, you
11:29:09 9 indicated that Mr. Brockman was going to step down
11:29:11 10 in two weeks -- maybe you didn't, but Jones Day told
11:29:14 11 the Government that?

11:29:15 12 **A.** I'm not a tax partitioner, so I'm not as adept.
11:29:19 13 The tax payer conference -- is that -- by that you
11:29:22 14 mean the phone call that resulted after this letter?

11:29:25 15 **Q.** Yes.

11:29:26 16 **A.** I did participate in that call.

11:29:27 17 **Q.** Okay. And that call was in April of 2020?

11:29:30 18 **A.** I think so, yes.

11:29:31 19 **Q.** And it may not have been you, but someone from
11:29:35 20 your team indicated that Mr. Brockman was going to
11:29:38 21 step down within two weeks?

11:29:39 22 **A.** I don't remember that, but...

11:29:44 23 **Q.** Are you aware that Mr. Brockman reorganized the
11:29:46 24 company in June of 2020?

11:29:54 25 **A.** I know there was a reorganization of a sort. I

11:29:56 1 couldn't tell you that it was in June.

11:29:58 2 Q. Okay. But after that reorganization, you are
11:30:00 3 aware that he continued to serve as CEO?

11:30:02 4 A. Well, I'd say -- reorganization -- the board --
11:30:06 5 I remember the board being reconfigured. When you
11:30:09 6 say reorganization of a company this large, I don't
11:30:11 7 want to be misunderstood for what it is that I can
11:30:14 8 remember.

11:30:14 9 The -- there was -- the board was
11:30:17 10 reconfigured as part of the process by which he
11:30:21 11 would withdraw.

11:30:24 12 Q. But he, in fact, did not withdraw in June; is
11:30:27 13 that fair?

11:30:27 14 A. I think that's right.

11:30:28 15 Q. Okay. Okay. You've got 82 there, which is the
11:30:39 16 exhibits to the left. And there are -- there are a
11:30:47 17 number of exhibits -- 16 if I counted on my fingers
11:30:51 18 correctly; is that fair?

11:30:51 19 A. I accept that if you have counted them, yes.

11:30:54 20 Q. And there are medical reports of Dr. York
11:30:56 21 attached?

11:31:00 22 A. Well, I -- you know, I'm sure that the exhibit
11:31:04 23 speaks for itself. I can page through and confirm
11:31:06 24 that for you if you like.

11:31:07 25 Q. Were you involved in exhibits attached to this

11:31:11 1 letter?

11:31:11 2 **A.** Could you repeat the question?

11:31:13 3 **Q.** So you wrote the letter April 9, 2020?

11:31:17 4 **A.** Right, we did.

11:31:17 5 **Q.** And I think you said you read it?

11:31:20 6 **A.** Yes.

11:31:20 7 **Q.** And you agreed with every word?

11:31:22 8 **A.** Yes.

11:31:23 9 **Q.** Okay. And so, I guess I should have extended

11:31:26 10 those questions to the exhibits. Had you

11:31:28 11 familiarized yourselves with the exhibits prior to

11:31:30 12 attaching to this letter?

11:31:32 13 **A.** I'm sure I did.

11:31:33 14 **Q.** So there are medical reports of Dr. York in

11:31:37 15 there?

11:31:38 16 **A.** Yes, I -- I see that.

11:31:39 17 **Q.** And of Dr. Jankovic?

11:31:42 18 **A.** Um, I -- haven't found it yet, but I accept

11:31:46 19 that if you remind me that.

11:31:47 20 **Q.** Okay. There are CV's of some of his doctors in

11:31:52 21 there, too?

11:31:53 22 **A.** Yes.

11:31:53 23 **Q.** Of Dr. Pool?

11:31:55 24 **A.** Okay.

11:31:56 25 **Q.** Of Dr. York?

11:31:58 1 **A.** All right. I'm on Dr. Lerner, but -- yeah, I'm
11:32:02 2 -- I'm sure.

11:32:03 3 **Q.** Okay.

11:32:03 4 **A.** I'll accept your representation to what's
11:32:05 5 included here.

11:32:06 6 **Q.** Fair to say, I think you just saw Dr. Lerner's
11:32:10 7 CV is in there?

11:32:11 8 **A.** Yes.

11:32:12 9 **Q.** And Dr. Lerner is Mr. Brockman's urologist; is
11:32:16 10 that fair?

11:32:17 11 **A.** I think that's right.

11:32:19 12 **Q.** He wasn't involved in treating Mr. Brockman for
11:32:21 13 dementia at all?

11:32:24 14 **A.** Well, I don't know -- I don't know the scope of
11:32:31 15 his treatment of Mr. Brockman.

11:32:33 16 **Q.** Okay. But we can agree that traditionally a
11:32:36 17 urologist would not be your first choice to get
11:32:40 18 treated for dementia?

11:32:40 19 **A.** I think that's right.

11:32:42 20 **Q.** Okay. And Mr. Brockman certainly had the
11:32:43 21 resources to get access to the best doctors?

11:32:48 22 **A.** Yes.

11:32:48 23 **Q.** So Dr. Lerner's CV here -- is that being
11:32:53 24 included just to be thorough?

11:32:55 25 **A.** I can't remember the reason to include him in

11:33:00 1 particular.

11:33:00 2 Q. Okay. And I'll turn you back to 81, now to
11:33:05 3 Page 4. Do you see the final line, all four --
11:33:25 4 Dr. Pool, Dr. Jankovic, Dr. York, and Dr. Yu agreed
11:33:29 5 that Mr. Brockman has mild to moderate dementia?

11:33:33 6 A. I see that.

11:33:33 7 Q. Okay. And was that all of the doctors he had
11:33:40 8 been seen by in April of 2020?

11:33:41 9 A. I don't know.

11:33:44 10 Q. Are you aware that he was being seen by
11:33:48 11 Dr. Lai, a neurologist at Houston Methodist?

11:33:53 12 A. I don't remember that.

11:33:55 13 Q. Okay. And is that -- you have forgotten since
11:33:58 14 then, or you were never aware of that?

11:34:00 15 A. I don't remember hearing Dr. Lai's name until
11:34:03 16 very recent weeks.

11:34:06 17 Q. And during the tax payer conference, that was
11:34:09 18 one of the doctors that was mentioned; isn't that
11:34:11 19 true?

11:34:11 20 A. I can't recall that.

11:34:13 21 Q. Okay. I guess in preparation for writing this
11:34:19 22 letter did you try to find out who all of
11:34:21 23 Mr. Brockman's doctors were?

11:34:22 24 A. Kathy Keneally conducted our liaison with his
11:34:27 25 doctors and investigated that. I didn't do that

11:34:29 1 personally.

11:34:29 2 Q. Okay. Were you curious when you read the
11:34:34 3 letter as to whether this was all of Mr. Brockman's
11:34:36 4 doctors?

11:34:37 5 A. I can't remember -- I can't remember that I
11:34:40 6 was.

11:34:41 7 Q. Did you try to find out if there were any
11:34:43 8 conflicting diagnoses?

11:34:45 9 A. I did not investigate with the doctors myself
11:34:49 10 personally.

11:34:49 11 Q. Okay. It's fair to say that Dr. Lai's CV is
11:34:55 12 not included in the attachments to this letter; is
11:34:57 13 that fair?

11:34:57 14 A. Well, I haven't paged through it, but I accept
11:35:00 15 that if that's what the document shows.

11:35:02 16 Q. Okay. And fair to say that Dr. Lai's name does
11:35:04 17 not appear anywhere in this letter?

11:35:07 18 A. Well, I haven't word searched it, but if you
11:35:09 19 tell me that's so I accept that.

11:35:11 20 Q. Okay. And so, your testimony is that in April
11:35:14 21 of 2020, you were not aware of who Mr. Brockman's
11:35:18 22 treating neurologist was?

11:35:20 23 A. Well, I don't know if I was or wasn't, because
11:35:25 24 I don't -- I'm not well familiar -- certainly not
11:35:30 25 any longer, with each of these doctors and their

11:35:33 1 separate roles.

11:35:34 2 Q. Okay. But I mean, we can agree that the
11:35:38 3 treating neurologist for a patient with cognitive
11:35:42 4 decline would be an important person to want to
11:35:45 5 speak to; right?

11:35:46 6 A. Well, I think that's right.

11:35:49 7 Q. And so --

11:35:49 8 A. But I'm not -- I'm not the best person to opine
11:35:53 9 on that, but I think that's right.

11:35:55 10 Q. Okay. Just one moment here.

11:36:10 11 MR. LANGSTON: Thank you, Your Honor.

11:36:11 12 Q. So you were not aware that in January of 2020,
11:36:14 13 Dr. Lai had diagnosed the Defendant with not
11:36:18 14 dementia, but mild cognitive impairment?

11:36:21 15 A. I don't remember knowing that.

11:36:23 16 Q. Okay. And you don't --

11:36:25 17 A. If that's the case, I don't remember knowing
11:36:27 18 that.

11:36:27 19 Q. You are not aware in February of 2020, Dr. Lai
11:36:30 20 examined him again and found not dementia but mild
11:36:35 21 cognitive impairment?

11:36:35 22 A. I don't -- I don't remember knowing that.

11:36:37 23 Q. Okay. So in -- in writing this letter, you
11:36:42 24 weren't aware of -- you weren't aware that
11:36:45 25 Mr. Brockman had continued to have medical exams?

11:36:48 1 **A.** Well, no, I understood that there was a course
11:36:53 2 of examination, and part of it stimulated and
11:36:55 3 requested by us.

11:37:00 4 **Q.** In your proofing of this letter, when you are
11:37:02 5 agreeing with every word, is one of the things you
11:37:05 6 would want to know is this still accurate?

11:37:07 7 **A.** I certainly wanted to do what I could to
11:37:09 8 contribute to see to it that it was accurate, yes.

11:37:12 9 **Q.** And so -- again, without getting into your
11:37:16 10 internal deliberations, did you want to know if he'd
11:37:18 11 seen a doctor since Dr. York saw him in December of
11:37:22 12 2019?

11:37:23 13 **A.** I don't remember having that question in mind.

11:37:25 14 **Q.** Okay. It's fair to say that the exams in
11:37:31 15 January of 2020, and February of 2020, are prior to
11:37:35 16 this letter; is that fair?

11:37:37 17 **A.** January and February are before April, yes.

11:37:39 18 **Q.** Okay. And I think if we go to Page 10 of the
11:37:44 19 letter there's a picture of two clocks?

11:37:59 20 **A.** Yes.

11:38:00 21 **Q.** And what did you think when you saw these
11:38:04 22 clocks?

11:38:04 23 **A.** I was startled.

11:38:06 24 **Q.** Why were you startled?

11:38:10 25 **A.** Because they are so far distorted from an

11:38:14 1 accurate picture of an analog clock.

11:38:21 2 Q. Was that part of what went into your thinking

11:38:24 3 that Mr. Brockman might not be able to help you?

11:38:27 4 A. Well, my -- my thinking that Mr. Brockman

11:38:30 5 wasn't able to help me was born of my own

11:38:34 6 experience.

11:38:40 7 Q. Okay.

11:38:40 8 A. This did alert me in a way as a non-medical

11:38:44 9 person -- I hadn't been before that he had cognitive

11:38:47 10 problems.

11:38:48 11 Q. Okay. I think one of the reasons you included

11:38:52 12 these were you thought they would be very persuasive

11:38:57 13 to the Department of Justice that if the clocks are

11:39:00 14 looking like this that Mr. Brockman may have some

11:39:03 15 mental issues; is that fair?

11:39:04 16 A. Yes. And Dr. York had set them out in her

11:39:08 17 report.

11:39:09 18 Q. So you thought that was a clear visual

11:39:14 19 depiction of Mr. Brockman's state of mind?

11:39:17 20 A. Well, one indication of it, yeah. Yes.

11:39:19 21 Q. Okay. Were you aware that Mr. Brockman had

11:39:24 22 drawn a clock more recently than December 3, 2019?

11:39:29 23 A. I know that there were a series of these

11:39:32 24 examinations that included this test. I can't

11:39:37 25 remember when they all were.

11:39:38 1 Q. Okay. So when Dr. Lai examined Mr. Brockman in
11:39:44 2 January, were you aware that he drew a clock?

11:39:47 3 A. No, because I don't remember being aware that
11:39:49 4 Dr. Lai conducted such an examination.

11:39:52 5 Q. And this is Page 143 of Exhibit 156, which is
11:40:00 6 in evidence. So were you aware -- and this clock is
11:40:11 7 more recent than the two clocks in the one that you
11:40:16 8 attached -- or the one you included in the letter to
11:40:21 9 the government?

11:40:22 10 A. Okay. If you represent that to me, I accept
11:40:23 11 that.

11:40:24 12 Q. Okay. January 8, 2020, is more recent than
11:40:27 13 December 3, 2019?

11:40:30 14 A. For sure, yes.

11:40:31 15 Q. And he drew this clock four months prior to
11:40:34 16 your letter to the Department of Justice?

11:40:37 17 A. Well, you are showing me this. I don't -- I
11:40:39 18 don't believe -- I'm quite sure I've never seen this
11:40:42 19 document, but if -- if that's what this represents,
11:40:47 20 then, yes.

11:40:49 21 Q. Fair to say this is a far better clock than the
11:40:52 22 two that were included in the letter to the
11:40:54 23 Government?

11:40:54 24 A. I think that's a better clock.

11:40:55 25 Q. Okay.

11:40:56 1 A. I think -- I think the -- the document I'm
11:40:58 2 looking at here dated 1/8/20 with that clock picture
11:41:03 3 I think is more coherent -- you know, closer than
11:41:08 4 the ones pictured on April 9th letter, yes.

11:41:10 5 Q. Okay. I think you testified you didn't know
11:41:13 6 this clock existed, I guess, at the time you wrote
11:41:16 7 the letter?

11:41:18 8 A. I don't believe that I did.

11:41:27 9 Q. You certainly did not personally did not make
11:41:30 10 the decision not to include this clock?

11:41:31 11 A. No.

11:41:33 12 Q. And had you known about it, you would have
11:41:36 13 wanted to include it in the letter; is that fair?

11:41:38 14 A. Well, what I understand better what this
11:41:40 15 document is, I see half a page -- half a single page
11:41:44 16 -- I certainly would study it, consider it, see how
11:41:49 17 it related to this other material and confer with
11:41:53 18 others about what ought to be included in such a
11:41:57 19 letter.

11:42:08 20 Q. Okay. Let me ask you this -- let's shift gears
11:42:11 21 a little from clocks. When do you believe that
11:42:13 22 Mr. Brockman learned of the criminal investigation?

11:42:17 23 A. Well, I'm quite sure that any answer to that
11:42:22 24 question would be privileged.

11:42:23 25 Q. Well, you included your belief of when he

11:42:26 1 learned of the investigation in the letter; isn't
11:42:27 2 that true?

11:42:28 3 **A.** I don't know that. Is that -- could you direct
11:42:31 4 my attention to it?

11:42:33 5 **Q.** Sure. So you'll look at Footnote 17, which is
11:42:41 6 on Page 15, in May 2017, long before Mr. Brockman
11:42:46 7 was aware he might be involved in an investigation.

11:42:49 8 **A.** Hold on. Page which?

11:42:52 9 **Q.** Page 15, Footnote 17.

11:43:06 10 **A.** Okay.

11:43:08 11 **Q.** So in April of 2021, you disclosed to the
11:43:14 12 Government when you believed -- at least in part --
11:43:18 13 when he learned of the investigation?

11:43:22 14 **A.** Well, the letter says what it says.

11:43:25 15 **Q.** And you said that it was all a true statement?

11:43:29 16 **A.** Yes.

11:43:30 17 **Q.** Okay. So when did he learn -- in your mind,
11:43:33 18 when do you believe he learned of the criminal
11:43:35 19 investigation?

11:43:36 20 **A.** Once again, that calls for privileged
11:43:39 21 communication.

11:43:39 22 MR. LOONAM: Objection. I think --
11:43:42 23 objection to the extent that the question calls for
11:43:44 24 communication from the client to Jones Day.

11:43:48 25 MR. LANGSTON: Your Honor, I don't

11:43:49 1 think they can say -- they can write a letter that
11:43:51 2 says they believe that, you know, he had symptoms
11:43:55 3 long before he learned he was aware of the
11:43:57 4 investigation and then claim privilege as to when he
11:44:00 5 learned of the investigation. That seems like using
11:44:02 6 as the sword and the shield.

11:44:03 7 MR. LOONAM: Well -- well -- well, it's
11:44:06 8 unclear if the source of the information here is a
11:44:11 9 communication from the client or if it's based on
11:44:14 10 the -- the -- the understanding of Jones Day from
11:44:17 11 objective other evidence when the client may have
11:44:20 12 learned of the investigation. It could have been
11:44:22 13 from -- in this case alone, Dr. Dietz set the date
11:44:28 14 in his report for when the client learned of the
11:44:32 15 investigation in 2018.

11:44:35 16 I understand this has been a moving
11:44:37 17 target and it's moved, you know, further back, back,
11:44:39 18 back by the Government, but it may not be based on
11:44:42 19 information from the client.

11:44:44 20 Um, I think perhaps there's a way
11:44:46 21 to --

11:44:46 22 MR. LANGSTON: I can ask --

11:44:47 23 THE COURT: I think easiest way cutting
11:44:51 24 to the chase is can he answer that question without
11:44:54 25 relating information that was told to him by

11:44:56 1 Mr. Brockman? If the answer is yes -- I mean, if
11:45:00 2 the answer is yes, then he can relate it. If it's
11:45:03 3 no, then he can't.

11:45:04 4 MR. LOONAM: I don't think the way that
11:45:05 5 question was phrased he could. There may be another
11:45:08 6 way to skin the cat. I don't know.

11:45:09 7 THE COURT: But you are absolutely
11:45:11 8 right. I mean, Mr. Romatowski cannot talk about --
11:45:15 9 if he -- if it was when Mr. Brockman told him that
11:45:19 10 that's covered by privilege and he can't answer it.
11:45:23 11 I mean, he can.

11:45:24 12 MR. LANGSTON: Okay.

11:45:25 13 THE COURT: So you can ask him if you
11:45:28 14 -- has that information from another source. If the
11:45:33 15 answer is yes, then he can answer it. But if his
11:45:36 16 source of that information is from Mr. Brockman, he
11:45:38 17 cannot.

11:45:39 18 MR. LANGSTON: Okay.

11:45:39 19 THE COURT: Breaches the
11:45:41 20 attorney-client privilege.

11:45:42 21 MR. LANGSTON:

11:45:43 22 Q. Setting aside any information you learned from
11:45:45 23 Mr. Brockman, are you able to say whether the first
11:45:49 24 sentence of Footnote 17 is true?

11:45:52 25 A. Well, I can't answer -- I can't explain -- I

11:46:03 1 can't answer a question about when Mr. Brockman
11:46:05 2 learned of the criminal investigation without
11:46:08 3 revealing attorney-client communications.

11:46:11 4 THE COURT: And that makes sense. I
11:46:13 5 mean, I don't know how you can. I mean, I know
11:46:15 6 where you want to go with this, but I don't know how
11:46:17 7 he can answer that.

11:46:18 8 MR. LANGSTON: I will say that -- you
11:46:20 9 know, they've said that to their experts. I think
11:46:22 10 their experts testified to what Ms. Keneally -- you
11:46:25 11 know, they specifically asked Ms. Keneally when did
11:46:27 12 he learn of the investigation, and she answered that
11:46:30 13 question to their experts.

11:46:31 14 THE COURT: Okay.

11:46:33 15 MR. LANGSTON: Again, they're
11:46:34 16 disclosing it in a communication to the Government.
11:46:37 17 In the extent that was disclosed to Mr. Brockman, I
11:46:39 18 think sort of already waived that privilege.

11:46:41 19 THE COURT: Use Ms. Keneally's
11:46:43 20 admission, then.

11:46:44 21 MR. LANGSTON: Okay.

11:46:45 22 Q. Ms. Keneally told Dr. Agronin that he learned
11:46:50 23 about it shortly around the search warrant; is that
11:46:53 24 fair?

11:46:53 25 THE COURT: Did she say that?

11:46:54 1 MR. LOONAM: The foundation here, I
11:46:56 2 believe, are -- and I want to get Counsel -- where
11:47:01 3 -- what he needs on this, right? But I think the
11:47:04 4 foundation for this is that comes from Dr. Agronin's
11:47:07 5 notes of a conversation with Ms. Keneally, and the
11:47:14 6 context for that was after Dr. Dietz -- Dr. Dietz
11:47:18 7 had issued his report. And Dr. Dietz's report -- I
11:47:23 8 believe Dr. Dietz pins the date of when the
11:47:27 9 Defendant learned of the investigation.

11:47:29 10 So the Government's expert pins the
11:47:31 11 date of when the Defendant learned of the
11:47:33 12 investigation as of a search warrant in Bermuda,
11:47:36 13 which was in September of 2018. So I think that was
11:47:39 14 the context for this conversation. So I don't --
11:47:43 15 you know --

11:47:44 16 THE COURT: Well, if she -- if she said
11:47:46 17 that, then -- well, if she said that, it's not
11:47:51 18 necessarily a waiver of the privilege. I mean, I
11:47:55 19 don't see it as a waiver of the privilege, but you
11:47:57 20 are sort of stuck with it. I mean, you are entitled
11:47:59 21 to rely on it, because that's what she said.

11:48:02 22 MR. LOONAM: I want to be clear. I
11:48:04 23 don't know if that's what Ms. Keneally -- I think
11:48:06 24 this was -- I don't know that attorney-client
11:48:10 25 privilege was waived. I think that --

11:48:11 1 THE COURT: I'm not saying it was
11:48:13 2 waived.

11:48:14 3 MR. LOONAM: I think that conversation
11:48:15 4 took place in the context of responding to the
11:48:19 5 Dietz's report, which pegged the date as of Kepke
11:48:24 6 search in -- no, the Tamine search.

11:48:32 7 MR. LANGSTON: I think it's the Kepke.

11:48:34 8 MR. LOONAM: The Bermuda search.

11:48:36 9 MR. VARNADO: I think he says Bermuda.

11:48:38 10 THE COURT: Let me read this.

11:48:41 11 MR. LOONAM: It's in Dr. Dietz's
11:48:42 12 report. It's definitely -- he sets in 2018.

11:48:46 13 MR. LANGSTON: I'm going to put a paper
11:48:47 14 copy rather than a laptop on the ELMO.

11:48:56 15 MR. MAGNANI: See if it still works.

11:48:57 16 THE COURT: Here's the deal.
11:48:59 17 Regardless of whether -- I mean, I'm not finding a
11:49:01 18 waiver of privilege.

11:49:02 19 MR. LANGSTON: Sure.

11:49:02 20 THE COURT: But the bottom line is
11:49:04 21 that's what she said, you can use it.

11:49:06 22 MR. LANGSTON: Okay.

11:49:07 23 THE COURT: You can cross-examine him
11:49:10 24 on it, but he can't answer -- I mean, you can't ask
11:49:14 25 him -- well -- it says what it says. He --

11:49:19 1 if he doesn't have any independent knowledge, other
11:49:22 2 than based on -- on attorney-client privilege
11:49:28 3 information, then he can't answer it. You have to
11:49:30 4 take it up with Ms. Keneally.

11:49:33 5 MR. LANGSTON: Okay.

11:49:33 6 THE COURT: But that's the date now
11:49:35 7 established, because that's what is in the expert
11:49:37 8 report. So you can ask him, "Is it your position in
11:49:41 9 this lawsuit that this is when it happened, yes or
11:49:44 10 no?"

11:49:45 11 MR. LANGSTON: Okay.

11:49:45 12 Q. So is it your position that it was in or around
11:49:50 13 August of 2018, when he learned of this?

11:49:53 14 A. Once again, for my part I don't know a way to
11:50:00 15 answer that question without revealing
11:50:05 16 attorney-client communication.

11:50:06 17 Q. Okay. Setting aside any attorney-client
11:50:09 18 communications, have you learned anything that makes
11:50:12 19 you believe it was earlier than that?

11:50:18 20 THE COURT: I don't know how he can
11:50:19 21 answer the question based on --

11:50:21 22 MR. LANGSTON: Okay. Let's do this --

11:50:23 23 THE COURT: I don't see it. I mean, I
11:50:25 24 understand where you want to go, but his
11:50:29 25 understanding is based on conversations with

11:50:33 1 Mr. Brockman. There's no way to get around that.

11:50:37 2 MR. LANGSTON:

11:50:38 3 Q. How about this? The date the investigation
11:50:40 4 started is an important date -- or the date
11:50:42 5 Mr. Brockman learned of the investigation is an
11:50:43 6 important date of this case; is that fair?

11:50:45 7 A. Well, I think -- I don't know that that's right
11:50:49 8 or not. I suppose so. I'll accept that, if you
11:50:51 9 think that's important. Yes, I would accept that.

11:50:53 10 Q. Okay. One of the reasons it's important for
11:50:55 11 this competency case is if he was showing symptoms
11:50:58 12 prior to learning of the investigation, it makes the
11:51:01 13 Government's theory that he's faking less likely; is
11:51:05 14 that fair?

11:51:05 15 A. Well, it sounds like that's your argument. I
11:51:10 16 sort of lost track of the double negatives in the
11:51:13 17 course of that, but I accept that's your argument.

11:51:15 18 Q. Okay. And you recognized when you wrote the
11:51:17 19 letter that was important information for the
11:51:19 20 Government; is that fair?

11:51:23 21 A. Well, that was important information. I
11:51:25 22 suppose I've lost track of the "That."

11:51:28 23 Q. Again, look at Footnote 17.

11:51:31 24 A. Yes.

11:51:31 25 Q. In May 2017, long before Mr. Brockman was aware

11:51:34 1 that he might be involved in an investigation, he
11:51:37 2 sent an e-mail to his friend Dr. Yudofsky?

11:51:39 3 **A.** Right.

11:51:39 4 **Q.** And so, you wrote that to the Government as
11:51:43 5 part of your effort to persuade the Government that
11:51:48 6 Mr. Brockman had a genuine illness; is that fair?

11:51:50 7 **A.** Yes. Yes.

11:51:51 8 **Q.** And the reason why you are saying it's long
11:51:52 9 before he might be involved in an investigation is
11:51:55 10 because again that makes it less likely he's faking?

11:52:00 11 **A.** Yeah, that defuses an allegation of a motive to
11:52:04 12 fabricate.

11:52:06 13 **Q.** So had he learned of the investigation prior to
11:52:09 14 this Dr. Yudofsky e-mail, that undermines that
11:52:13 15 argument a little bit; is that fair?

11:52:14 16 **A.** Yes.

11:52:15 17 **Q.** Okay. And if the e-mail sent to Dr. Yudofsky
11:52:18 18 is not genuine, that would also undermine that
11:52:22 19 argument a little bit?

11:52:23 20 **A.** I suppose that's right.

11:52:31 21 **Q.** You didn't speak to Dr. Yudofsky; did you?

11:52:34 22 **A.** No.

11:52:35 23 **Q.** Why not?

11:52:37 24 **A.** Well, there's a lot to do. There came a point
11:52:42 25 when Dr. Yudofsky had separate counsel of his own.

11:52:47 1 I don't remember when that happened or when we
11:52:49 2 learned, but he wasn't available to us to speak --
11:52:49 3 Q. So you just didn't get around to it?
11:52:55 4 A. -- and further, my role did not include liaison
11:53:05 5 with the physicians --
11:53:05 6 Q. Well, I think you described here Dr. Yudofsky
11:53:07 7 is a friend?
11:53:07 8 A. Yes, he's a close friend of Mr. Brockman.
11:53:09 9 Q. So that's outside of your purview?
11:53:13 10 A. Well, yes. I regarded Dr. Yudofsky as -- you
11:53:18 11 know, among that -- that group of doctors, including
11:53:23 12 treating physicians, that Ms. Keneally was our
11:53:26 13 liaison to.
11:53:28 14 Q. So Ms. Keneally is the person that tried to set
11:53:30 15 up this meeting with Dr. Yudofsky?
11:53:32 16 A. Well, I didn't say anybody tried to set up a
11:53:34 17 meeting with Dr. Yudofsky. I don't know if that
11:53:36 18 happened or not.
11:53:37 19 Q. Okay. The last sentence of this is, "Because
11:53:40 20 we understand Dr. Yudofsky is a potential witness
11:53:45 21 represented by counsel in this matter" --
11:53:47 22 A. There you go.
11:53:49 23 Q. -- "we have not contacted him to discuss his
11:53:52 24 confidential examination of Mr. Brockman."
11:53:55 25 Is --

11:53:57 1 **A.** Okay. That's what it says, yes.

11:53:58 2 **Q.** Okay. And was that your understanding in April

11:54:01 3 of 2020, as to why you hadn't spoken to

11:54:06 4 Dr. Yudofsky?

11:54:10 5 **A.** I don't want to split hairs, but I can't

11:54:12 6 remember this detail of that letter. But obviously

11:54:14 7 that was my state of mind at the time.

11:54:16 8 **Q.** Okay.

11:54:16 9 **A.** Because I read this at the time, understood it,

11:54:18 10 and didn't have any reason to disagree with any of

11:54:21 11 it.

11:54:21 12 **Q.** Okay. And this is not -- this doesn't say, "We

11:54:25 13 contacted his counsel and his counsel said no"?

11:54:27 14 This says, "We have not contacted

11:54:30 15 Dr. Yudofsky"; right?

11:54:32 16 **A.** It says we have not contacted him to discuss

11:54:34 17 his confidential examination of Mr. Brockman; that's

11:54:36 18 right.

11:54:36 19 **Q.** And the reason you give for having not

11:54:39 20 contacted him was that he was a potential witness

11:54:43 21 represented by counsel?

11:54:44 22 **A.** That's what this says.

11:54:45 23 **Q.** Does Jones Day have a policy not to contact

11:54:49 24 potential witnesses who are represented by counsel?

11:54:51 25 **A.** No.

11:54:53 1 Q. And, in fact, Jones Day has contacted a lot of
11:54:56 2 witnesses in this case represented by counsel?
11:54:58 3 A. Well, through their counsel, yes.
11:55:00 4 Q. Mr. Tamine or Tamine?
11:55:03 5 A. Yes.
11:55:03 6 Q. Mr. Burnett?
11:55:04 7 A. I think so, yes.
11:55:05 8 Q. Mr. Moss?
11:55:06 9 A. I think so, yes.
11:55:07 10 Q. Dr. Pool?
11:55:09 11 A. Likewise. I didn't make those contacts, but I
11:55:12 12 believe that Jones Day has, yes.
11:55:13 13 Q. Tommy Barris?
11:55:15 14 A. Same.
11:55:16 15 Q. Robert Smith?
11:55:18 16 A. Robert Smith -- yes, we have been in contact
11:55:23 17 with counsel for Robert Smith.
11:55:24 18 Q. In fact, even Mrs. Brockman is represented by
11:55:27 19 counsel?
11:55:27 20 A. Yes, she is.
11:55:28 21 Q. And you are still willing to contact her, even
11:55:30 22 though she's a potential witness represented by
11:55:32 23 counsel?
11:55:32 24 A. Well, yes. We've considered carefully with her
11:55:36 25 counsel about the appropriate relationship and

11:55:41 1 appropriate boundaries for contact with
11:55:44 2 Mrs. Brockman directly, and with her counsel's
11:55:48 3 careful consideration there has been a relationship
11:55:50 4 struck that permits us to speak to Mrs. Brockman.

11:55:53 5 Q. Why the exception for Dr. Yudofsky?

11:55:55 6 A. I -- I don't remember the -- this was our
11:55:59 7 position at the time about Dr. Yudofsky, so I can't
11:56:03 8 --

11:56:03 9 Q. You said every word in this letter is accurate;
11:56:06 10 right?

11:56:06 11 A. I read it to satisfy myself that as best I
11:56:09 12 could tell it was accurate, yes.

11:56:11 13 Q. I think you testified earlier that after
11:56:13 14 reading you believed that every word was accurate?

11:56:15 15 A. Yes.

11:56:15 16 Q. And so, that would include the footnotes;
11:56:18 17 right?

11:56:18 18 A. Yes.

11:56:18 19 Q. We're not just talking about the text?

11:56:20 20 A. Yes.

11:56:20 21 Q. And so, you are saying it's an accurate
11:56:22 22 statement?

11:56:23 23 A. Mm-hmm.

11:56:24 24 Q. That Jones Day declined to contact Dr. Yudofsky
11:56:28 25 because he was represented by counsel?

11:56:31 1 **A.** Well, I don't remember that independently, but
11:56:34 2 I read that here so I'm sure that was our position.
11:56:37 3 **Q.** And that that's a policy that has not been
11:56:40 4 extended to the other witnesses in this case?
11:56:43 5 **A.** Well, our relationship, one by one to witnesses
11:56:47 6 in any case, is very much a case-by-case question.
11:56:52 7 **Q.** Did you know at the time you wrote this letter
11:56:56 8 that Dr. Yudofsky was going to take the Fifth to all
11:57:00 9 questions related to his treatment of Mr. Brockman?
11:57:05 10 **A.** No, I'm quite sure I did not know that.
11:57:08 11 **Q.** Okay. So the way this is worded is just
11:57:16 12 because Dr. Yudofsky had an attorney, Jones Day did
11:57:18 13 not bother to reach out to him; that's your
11:57:20 14 testimony?
11:57:21 15 **A.** Well, it does not say we did not bother. It
11:57:23 16 says what it says.
11:57:24 17 **Q.** It says, "We have not contacted him"?
11:57:27 18 **A.** Correct.
11:57:28 19 **Q.** And so that's, "We didn't even make an
11:57:31 20 attempt"?
11:57:31 21 **A.** That I think is a fair implication of this.
11:57:34 22 **Q.** So you are trying to assemble the best evidence
11:57:39 23 you can to convince the Government not to indict
11:57:42 24 your client?
11:57:43 25 **A.** Right.

11:57:44 1 Q. And this letter is an important stage in the
11:57:48 2 case?

11:57:48 3 A. An important first step in that process, yes.

11:57:51 4 Q. And prior to taking that important first step,
11:57:56 5 you didn't bother to contact this witness?

11:57:59 6 A. I didn't do so, and I read here that we did not
11:58:03 7 -- that Jones Day did not.

11:58:22 8 MR. LANGSTON: I have nothing further,
11:58:23 9 Your Honor.

11:58:24 10 MR. LOONAM: Short redirect, Your
11:58:25 11 Honor.

11:58:25 12 THE COURT: Let me -- before we go on,
11:58:27 13 I want to make sure I get this. So who is Mr. David
11:58:31 14 Schmeck (phonetic) to your knowledge?

11:58:34 15 MR. VARNADO: Your Honor, I apologize.
11:58:35 16 I don't know that name.

11:58:39 17 THE COURT: Um, okay. I was trying to
11:58:41 18 figure out -- my understanding is that he is counsel
11:58:45 19 for Reynolds and Reynolds; is that right?

11:58:49 20 MR. VARNADO: David Schmeck --

11:58:53 21 MR. LANGSTON: Scott Cherry is the
11:58:54 22 general counsel.

11:58:55 23 MR. LOONAM: Yeah, Cherry.

11:58:58 24 THE COURT: Okay. Great.

11:59:00 25 MR. LOONAM: It's not ringing a bell

11:59:01 1 for me either, Your Honor. Let me look back and see
11:59:04 2 if there are -- anyone?

11:59:06 3 THE COURT: Okay. This is a collateral
11:59:08 4 issue that I was looking at, so I wanted to make
11:59:10 5 sure.

11:59:11 6 Then the second question I had,
11:59:13 7 just briefly, I want to make sure I understood the
11:59:16 8 decision not to tell counsel that were involved in
11:59:22 9 the depositions of Mr. Brockman, that decision was
11:59:26 10 made by Mr. Brockman or was it made by you?

11:59:29 11 THE WITNESS: That was made by us, but
11:59:31 12 it was pursuant to a general request by Mr. Brockman
11:59:37 13 that we keep closely held and not tell others about
11:59:41 14 his medical problems.

11:59:42 15 THE COURT: Okay. So others included
11:59:44 16 counsel that was representing him in the
11:59:47 17 depositions?

11:59:49 18 THE WITNESS: Well, he didn't specify.
11:59:50 19 He just asked us to keep to ourselves and not tell
11:59:53 20 others. We applied that direction to those counsel
11:59:58 21 as well. We respected that request.

11:59:59 22 THE COURT: Okay. I just wanted to
12:00:01 23 make sure I understood it. Thank you.

24 ///
25 ///

12:00:01 1 **REDIRECT EXAMINATION**12:00:01 2 **BY MR. LOONAM:**

12:00:10 3 Q. On that point, pick up where Judge left off.

12:00:16 4 Were you aware, or did you have knowledge of whether
12:00:18 5 Mr. Brockman had any concerns of being perceived as
12:00:21 6 weak because of his diagnosis?

12:00:23 7 A. Yes.

12:00:23 8 Q. Can you tell us about that?

12:00:25 9 A. Well, I -- I do remember that he -- he was
12:00:28 10 concerned that certain people at the company and
12:00:35 11 others might have that reaction.12:00:37 12 MR. LANGSTON: Your Honor, I'm going to
12:00:38 13 object here. I don't necessarily have a problem
12:00:40 14 with the question, but to the extent he's going to
12:00:42 15 be able to testify about things Mr. Brockman told
12:00:44 16 him with respect to his motivation, and we are not
12:00:46 17 allowed to ask other information that he learned
12:00:48 18 from his client I think is a little unfair.12:00:51 19 THE COURT: It's getting close to
12:00:54 20 touching upon attorney-client privilege. If he's
12:00:57 21 talking about what motivated him to tell his lawyers
12:01:00 22 not to disclose that information, then you're
12:01:06 23 opening up the door. I don't think you want to, but
12:01:09 24 you're opening up the door about him cross-examining
12:01:14 25 about exactly what words he used.

12:01:17 1 MR. LOONAM: I certainly don't want the
12:01:18 2 direct communication. I was asking for -- for
12:01:20 3 Mr. Romatowski's understanding and -- and impression
12:01:24 4 that I think laid the foundation, but I can move on.

12:01:28 5 THE COURT: Okay. Because I mean, I
12:01:30 6 understand where you are going.

12:01:31 7 MR. LOONAM: Yep.

12:01:31 8 THE COURT: My question was focused on
12:01:33 9 -- I wanted to know who made the call, and that was
12:01:36 10 it. I didn't ask about any conversations about why
12:01:38 11 it was made, who made it -- I mean, why it was made,
12:01:41 12 the discussions. I just wanted to know who made the
12:01:44 13 call. You are actually getting into why the call
12:01:49 14 was made, and that's pushing into attorney-client
12:01:52 15 privilege information.

12:01:53 16 MR. LOONAM: Your Honor, it's --

12:01:54 17 THE COURT: I mean --

12:01:56 18 MR. LOONAM: -- thank you. I don't
12:01:58 19 want to do that, and so we're not going to do and so
12:02:00 20 I'll withdraw.

12:02:01 21 THE COURT: Okay.

12:02:03 22 MR. LOONAM:

12:02:03 23 Q. You -- in discussing the letter and what was in
12:02:11 24 the letter, what was not in the letter, you
12:02:13 25 described the April letter -- Government's

12:02:19 1 Exhibit --

12:02:19 2 MR. VARNADO: 81.

12:02:22 3 MR. LOONAM:

12:02:23 4 Q. -- 81 -- you don't need to look at it -- as an

12:02:28 5 important first step. What do you mean you viewed

12:02:30 6 this an important first step?

12:02:32 7 A. Well, we expected this to start a process to

12:02:35 8 open up a dialogue between us and prosecutors about

12:02:37 9 these medical issues, interviews by the Government

12:02:44 10 of our doctors, which we offered that they conduct

12:02:48 11 without our participation in any respect, possibly

12:02:50 12 further medical examination requested by the

12:02:53 13 Government -- by physicians of their own choosing.

12:02:57 14 And I expected that this would start an -- a

12:03:01 15 rigorous inquiry into his medical condition and

12:03:07 16 discussion back and forth between us and a

12:03:11 17 responsible decision reached on the question.

12:03:13 18 So I -- this was not the last word.

12:03:16 19 -- this April letter was the first word, expecting

12:03:19 20 that all of this material -- whatever source had new

12:03:26 21 material generated in the fashion I described would

12:03:28 22 contribute to that conversation.

12:03:29 23 Q. And on cross-examination you were asked

12:03:34 24 questions about Dr. York and whether you had

12:03:39 25 retained an independent forensic expert to conduct

12:03:43 1 an examination of Mr. Brockman; do you recall that
12:03:46 2 testimony on direct?

12:03:47 3 **A.** Right.

12:03:47 4 **Q.** On cross-examination?

12:03:49 5 **A.** Yes.

12:03:49 6 **Q.** Well, did -- did you indeed invite the
12:03:55 7 Government to do exactly that?

12:03:57 8 **A.** Yes.

12:04:00 9 **Q.** And did you have any reason to believe that,
12:04:05 10 um, the information obtained from Dr. York at Baylor
12:04:12 11 Medical School -- that she was doing anything less
12:04:15 12 than an honest job?

12:04:16 13 **A.** None at all.

12:04:18 14 **Q.** Did you believe that Dr. York at Baylor Medical
12:04:20 15 School was doing -- was not qualified or capable of
12:04:25 16 providing the information you needed to provide to
12:04:30 17 the Department of Justice -- as a first step?

12:04:32 18 **A.** We thought that she was well qualified and an
12:04:35 19 appropriate person to contribute to this inquiry.

12:04:38 20 **Q.** Um --

12:04:40 21 **A.** We didn't think she'd be the last word.

12:04:45 22 **Q.** And here we are. She wasn't the last word.

12:04:49 23 **A.** Turns out.

12:04:52 24 **Q.** You were asked questions about Dr. Lai -- well,
12:05:00 25 going back to the -- the April 6th letter and -- and

12:05:05 1 Dr. Yudofsky, are you aware that Jones Day provided
12:05:13 2 HIPAA waivers to the Government so that it could
12:05:17 3 obtain records and engage in conversations with, um,
12:05:21 4 Mr. Brockman's treating doctors?

12:05:22 5 **A.** Yes.

12:05:22 6 **Q.** And are you aware of whether the Government
12:05:25 7 provided a HIPAA waiver for Dr. Yudofsky?

12:05:28 8 **A.** Whether the Government provided --

12:05:30 9 **Q.** No, I'm sorry. Whether -- whether -- whether
12:05:32 10 Jones Day provided a HIPAA waiver for Dr. Yudofsky
12:05:35 11 so the Government could talk to --

12:05:36 12 **A.** I believe that's correct.

12:05:48 13 **Q.** You were asked questions about Dr. Lai and
12:05:52 14 Dr. Lai's diagnosis. Are you aware that Dr. Lai has
12:05:57 15 now diagnosed Mr. Brockman with dementia?

12:06:00 16 **A.** I don't know anything about Dr. Lai's opinions,
12:06:03 17 I'm afraid.

12:06:05 18 **Q.** You were asked questions about short-term
12:06:09 19 memory and long-term memory, and Mr. Brockman's
12:06:13 20 ability to -- and I think if we go back -- discuss
12:06:19 21 contemporaneous events; do you recall that
12:06:22 22 testimony?

12:06:22 23 **A.** I recall there were questions in that area.

12:06:23 24 **Q.** Okay. And now that we've gone down this
12:06:28 25 hearing, there may be distinctions between

12:06:31 1 discussing contemporaneous events and memory. Did
12:06:35 2 you -- in connection with Bob's resignation from
12:06:43 3 Reynolds and Reynolds, do you recall anything where
12:06:48 4 you could highlight the distinction between being
12:06:52 5 able to discuss contemporaneous events and having a
12:06:55 6 memory for contemporaneous events?

12:06:59 7 **A.** I'm afraid I'm not acquainted with the
12:07:05 8 distinction. I'm not aware of the testimony that's
12:07:08 9 elaborated this, so I just don't have anything to
12:07:12 10 offer in that respect -- put that way.

12:07:14 11 **Q.** No, fair enough. It's a terrible question.
12:07:21 12 You were asked questions on direct about
12:07:22 13 Mr. Brockman having to continue to sign board
12:07:26 14 resolutions, you know, while he remained in the
12:07:29 15 position at Reynolds and Reynolds; correct?

12:07:30 16 **A.** Yes, but I had questions about a
12:07:36 17 reorganization. What I remember is that the board
12:07:37 18 was reconstituted.

12:07:38 19 **Q.** And do you know if Mr. Brockman needed to sign
12:07:43 20 documents in connection with his resignation from
12:07:48 21 Reynolds and Reynolds?

12:07:48 22 **A.** I'm quite sure he did, yes.

12:07:55 23 **Q.** Do you recall discussions afterwards that are
12:07:57 24 raised concerns about Mr. Brockman's cognitive
12:07:59 25 abilities?

12:07:59 1 A. Well, there were discussions throughout about
12:08:02 2 our concerns about Mr. Brockman's cognitive
12:08:04 3 abilities.

12:08:05 4 Q. Okay. But as you sit here today you don't
12:08:07 5 recall whether there was a specific instance that
12:08:09 6 you recall in connection with his resignation?

12:08:11 7 A. I -- I can't say that I recall that.

12:08:15 8 MR. LOONAM: All right. No further
12:08:16 9 questions for this witness, Your Honor.

12:08:18 10 THE COURT: Okay. Anything further
12:08:19 11 from this witness?

12:08:20 12 MR. LANGSTON: No, Your Honor.

12:08:21 13 THE COURT: May Mr. Romatowski be
12:08:22 14 excused?

12:08:25 15 MR. LANGSTON: Yes.

12:08:26 16 MR. VARNADO: Yes, Your Honor.

12:08:27 17 THE WITNESS: Thank you.

12:08:27 18 THE COURT: You are excused, sir.

12:08:30 19 THE WITNESS: Thank you, Your Honor.

12:08:31 20 Happy Thanksgiving.

12:08:32 21 THE COURT: Happy Thanksgiving.

12:08:34 22 Counsel, I want to take a quick
12:08:36 23 recess and think about the issue. One quick
12:08:38 24 question, though. First, Ms. Keneally, I don't -- I
12:08:43 25 don't mean to talk to you -- talk about you like in

12:08:45 1 the third person here, but Ms. Keneally, what -- her
12:08:50 2 -- how is her testimony going to differ from
12:08:54 3 Mr. Romatowski? They're both from Jones Day. They
12:08:56 4 both saw Mr. Brockman.

12:09:01 5 MR. LOONAM: Your Honor, it's -- it's
12:09:02 6 largely duplicative. The Government has a point
12:09:06 7 that Ms. Keneally has had some more recent contact
12:09:12 8 with Mr. Brockman, but I think we have a lot of
12:09:18 9 testimony about the downward progression of
12:09:22 10 Mr. Brockman's disease, especially after the
12:09:25 11 delirium episodes.

12:09:28 12 So that -- that's largely in the
12:09:30 13 record. You know, so -- so I think it does largely
12:09:35 14 duplicate, and certainly the -- the vast majority of
12:09:41 15 my direct would duplicate what -- what
12:09:44 16 Mr. Romatowski has testified to.

12:09:46 17 THE COURT: Okay. I mean, and so -- I
12:09:52 18 guess my question to the Government is what's the
12:09:53 19 prejudice -- I know they didn't give you time --
12:09:57 20 they didn't follow my rules to give you adequate
12:09:59 21 time to prepare, but they're just going to
12:10:01 22 cross-examine her on, you know, the more recent
12:10:05 23 issues of incompetence. Why can't I give you guys,
12:10:12 24 you know, a couple hours or a little time to be
12:10:14 25 prepared for that and then address it?

12:10:17 1 MR. LOONAM: I mean --
12:10:19 2 MR. COREY SMITH: If I can respond?
12:10:20 3 You know, we don't want to cause all of this
12:10:23 4 consternation. We do all want to get finished. The
12:10:26 5 holidays are tomorrow. If they want to put
12:10:27 6 Ms. Keneally on to say the same thing Peter
12:10:29 7 Romatowski -- let's just move forward. And so, you
12:10:32 8 know, we just noted our objection we weren't given
12:10:35 9 proper notice.

12:10:36 10 We're ready to go if they want to
12:10:37 11 go, let's just finish this thing and get this last
12:10:40 12 bit of testimony. We're fine with that, Judge.

12:10:43 13 MR. LOONAM: Your Honor, I don't want
12:10:44 14 to waste -- going to duplicate. We'll rest.

12:10:47 15 THE COURT: I'm not forcing anyone to
12:10:48 16 rest. I mean, the -- what I'm looking at is my
12:10:51 17 rules are basically for notice so that the
12:10:55 18 proceeding can go forward on an expedited basis and
12:11:03 19 an orderly basis. You know, basically one of the
12:11:08 20 main reasons for the rule is to make sure that the
12:11:10 21 parties have enough time to prepare and be ready for
12:11:13 22 the witness.

12:11:16 23 So what I was thinking about is
12:11:18 24 just giving you additional time, but I want -- I'm
12:11:20 25 not cutting you off because it's Thanksgiving. If

12:11:23 1 you want additional time, I'm here. I'll give it to
12:11:25 2 you.

12:11:26 3 MR. LOONAM: Your Honor, given the
12:11:27 4 timing of where we are and the -- and the
12:11:30 5 duplication of the testimony and what's already in
12:11:33 6 the record about the progressive nature of the
12:11:35 7 disease and the observations I think from all sides
12:11:38 8 -- I mean, we're -- I think at the end of the day,
12:11:40 9 and we have a briefing and discuss the briefing
12:11:43 10 schedule, but -- but -- but we're slicing the
12:11:47 11 difference between, you know, what is reasonable
12:11:51 12 between early dementia, moderate dementia or MCI,
12:11:54 13 and his capabilities. You know, I -- I think the
12:11:58 14 Court has what it needs, and the parties have what
12:12:03 15 they need to brief this at this point. I don't want
12:12:06 16 to duplicate and keep everyone here and -- and
12:12:09 17 prejudice anyone.

12:12:10 18 So we rest.

12:12:12 19 THE COURT: Okay.

12:12:14 20 MR. COREY SMITH: We just want the
12:12:14 21 record to be clear that we're not -- we want the
12:12:18 22 record to reflect in some way the Government is
12:12:20 23 encouraging them to rest that if they did want to --
12:12:22 24 we're ready to go.

12:12:23 25 THE COURT: Okay.

12:12:24 1 MR. COREY SMITH: If that's -- do what
12:12:26 2 they want. That's fine. But for appellate
12:12:29 3 purposes, we're not encouraging that or requesting
12:12:31 4 it. That's their decision.

12:12:34 5 MR. LOONAM: Yeah, no. We -- we don't
12:12:36 6 think there's any due process violation with respect
12:12:39 7 to this -- at this point. We understand that, you
12:12:45 8 know, the Court's willing to give them time. They
12:12:48 9 don't want to -- the appellate issue -- we -- we --
12:12:51 10 we're not -- we rest, and we rest in light of the
12:12:55 11 Government's comment.

12:12:57 12 THE COURT: Okay.

12:12:59 13 MR. LOONAM: Comment they don't --
12:13:02 14 MR. COREY SMITH: Yeah, there's no
12:13:03 15 objection. We're satisfied.

12:13:05 16 THE COURT: Well, we'll bring this
12:13:07 17 hearing to a close then. Counsel, thank you for
12:13:10 18 your time and your focus. We got a lot done in the
12:13:14 19 course of a, you know, week and a half. I
12:13:16 20 appreciate you guys working with my schedule as
12:13:19 21 well.

12:13:21 22 What about the briefing?

12:13:24 23 MR. COREY SMITH: Before we get to
12:13:25 24 that, Your Honor. We do have one document we want
12:13:27 25 to put in rebuttal --

12:13:29 1 THE COURT: Okay.

12:13:29 2 MR. COREY SMITH: -- which is marked as

12:13:30 3 175, which is the October 15th transcript of the

12:13:34 4 Defendant's arraignment in San Francisco by --

12:13:38 5 THE COURT: Okay.

12:13:39 6 MR. COREY SMITH: -- representing the

12:13:40 7 defendant at that time was Neal Stephen's partner at

12:13:43 8 Jones Day, and we can put the transcript in.

12:13:45 9 MR. VARNADO: Don't object to it.

12:13:47 10 MR. LOONAM: No objection.

12:13:50 11 MR. COREY SMITH: Want a copy?

12:13:51 12 MR. VARNADO: Know what it says.

12:13:52 13 MR. COREY SMITH: I want to read into

12:13:53 14 the record, because this is relevant to the issues

12:13:55 15 today. In answer to a question from the Court,

12:13:58 16 Mr. Stephens told the Court in response to -- in

12:14:01 17 regard to Mr. Brockman that, "He is not a flight

12:14:04 18 risk. He's certainly not a danger to the community.

12:14:06 19 He's dealing with serious medical issues" -- I'm

12:14:10 20 sorry. Let me start over. I got the wrong

12:14:12 21 paragraph.

12:14:13 22 "To counsel's point, Your Honor, on

12:14:15 23 risk of flight, Mr. Brockman has known about this

12:14:17 24 investigation for four years. He's here today, you

12:14:21 25 know, voluntarily after accepting summons from the

12:14:23 1 government" -- and it goes on.

12:14:24 2 That's Page 18 of the transcript.

12:14:26 3 So we move that into evidence.

12:14:27 4 MR. VARNADO: We have no objection to
12:14:29 5 that, Your Honor. I want to try to get the audio of
12:14:32 6 that to see if he's known about it "for years," or
12:14:37 7 "for four years."

12:14:38 8 I -- he -- may only said --

12:14:40 9 Mr. Stephens may have said "for four" --

12:14:43 10 MR. COREY SMITH: The transcript says
12:14:44 11 "for four."

12:14:45 12 MR. VARNADO: I agree with you. The
12:14:46 13 transcripts in this case riddled with errors -- not
12:14:55 14 these ones. The Zoom hearings are a challenge.

12:14:56 15 MR. LOONAM: Can we agree to keep the
12:14:58 16 record open for the audio portion of that? We
12:15:00 17 obviously all want a perfect record.

12:15:03 18 MR. COREY SMITH: Have to contact the
12:15:04 19 court reporter in San Francisco.

12:15:06 20 THE COURT: Sure. Here's what we'll
12:15:08 21 do, and this is part of getting everything together
12:15:10 22 for me. I need you all to get together and agree on
12:15:13 23 everything that was admitted, and then get that to
12:15:16 24 me and I will give you all an affidavit basically to
12:15:20 25 sign saying this is all of the evidence so that

12:15:22 1 there's no question on appeal if there's an appeal
12:15:26 2 what evidence the Court had to consider.

12:15:28 3 MR. LOONAM: Yeah.

12:15:28 4 THE COURT: Because everybody was --
12:15:30 5 there are bits and pieces of things that had already
12:15:33 6 been introduced. I need everything in one place,
12:15:37 7 either in a box or one computer file, and then I'll
12:15:39 8 give you my case manager. Ask him for it -- the
12:15:44 9 form I need you to fill out. -- just an
12:15:47 10 acknowledgement saying, "These are all of the
12:15:49 11 documents. This is everything that the Court should
12:15:51 12 consider," so that I'm not inadvertently considering
12:15:54 13 something that wasn't introduced or -- or -- or
12:15:58 14 wasn't given to me in the proper form.

12:16:01 15 MR. VARNADO: We've been communicating
12:16:03 16 really collaboratively with the Government all week.
12:16:05 17 And I think what I would recommend -- and we haven't
12:16:09 18 talked to Corey about this yet -- prepare a
12:16:11 19 stipulation that says, "We all agree these were the
12:16:13 20 items entered into evidence, and these following
12:16:16 21 exhibits should be sealed because of so much medical
12:16:18 22 evidence."

12:16:20 23 So we're on it, and I think
12:16:22 24 collaborating every night after work to try --

12:16:25 25 MR. COREY SMITH: The parties have been

12:16:26 1 matching exhibit lists and exhibits. They've been
12:16:28 2 working together. I'm informed we have a set of
12:16:31 3 exhibits that have all -- that have been shown to
12:16:33 4 counsel. They've agreed that -- at least the
12:16:36 5 Government exhibits. I believe the same has gone
12:16:38 6 the other way.

12:16:39 7 So I think we're just about there,
12:16:41 8 Judge.

12:16:41 9 THE COURT: Okay.

12:16:42 10 MR. LOONAM: I would only add, I think
12:16:45 11 under your rules there's a 48-hour --

12:16:48 12 THE COURT: Right, we'll suspend the
12:16:50 13 48 hours, because it's the holidays.

12:16:53 14 MR. LOONAM: Big sigh of relief here.
12:16:54 15 We very much appreciate that.

12:16:56 16 THE COURT: It'll be by agreement of
12:16:57 17 the parties. Typically I want 48 hours, because
12:17:01 18 usually what happens after an evidentiary hearing or
12:17:03 19 a trial is everybody goes their separate ways. They
12:17:06 20 leave poor hapless legal assistants to try to sort
12:17:10 21 it all out and the lawyers are gone. So I tell
12:17:12 22 them, "Forty-eight hours. Get it. Do it and then
12:17:16 23 it is done."

12:17:17 24 But in this case there's a holiday
12:17:19 25 involved, so it'll be -- you'll get it together by

12:17:21 1 agreement of the parties.

12:17:24 2 MR. VARNADO: Very good, Judge.

12:17:25 3 MR. LOONAM: Thank you, sir.

12:17:27 4 MR. COREY SMITH: Now the briefing
12:17:28 5 schedule.

12:17:28 6 MR. VARNADO: So right now, Judge, we

12:17:30 7 just have an order that you entered on

12:17:34 8 September 17th that sort of adjusted the

12:17:36 9 post-hearing briefing schedule when this got

12:17:37 10 continued from September to last week. I think at

12:17:41 11 that point in time the Government estimated their

12:17:43 12 case would take two and a half days, and we thought

12:17:46 13 the balance of our case would take a total of five

12:17:48 14 days. We're here now on day eight.

12:17:51 15 That's not anything pejorative of

12:17:55 16 either side. It's been a well-litigated case in all

12:17:57 17 respects, but I think increased volume -- the

12:18:02 18 current briefing deadline is December 6th. I think

12:18:04 19 that's far too soon, and there's a lot to consider.

12:18:08 20 So what we consider is additional

12:18:11 21 briefing be 30 days from today, which would take us

12:18:14 22 to December 23rd, at least before Christmas.

12:18:17 23 And then, sometime after -- I think

12:18:18 24 the current schedule would contemplate -- I think it

12:18:21 25 was two weeks for just, you know, simultaneous reply

12:18:24 1 briefing. We would suggest it be pushed out a
12:18:27 2 little bit to January 10th for replies just so
12:18:31 3 people aren't having to work completely between
12:18:34 4 Christmas and New Year's.

12:18:35 5 You'll have everything by the 10th
12:18:37 6 of January with all of the parties's submissions.
12:18:40 7 That's our proposal to the Court.

12:18:41 8 THE COURT: Okay.

12:18:42 9 MR. COREY SMITH: We were looking for
12:18:43 10 something a little bit quicker. We were looking to
12:18:45 11 propose initial briefs by December 10th, which is
12:18:49 12 the Friday after the 6th, and keep the response
12:18:51 13 briefs on the 23rd as initially scheduled.

12:18:55 14 THE COURT: Okay. Is there a reason --
12:18:58 15 and my concern -- I want to try to get this done as
12:19:02 16 quickly as possible, but I don't want to
12:19:04 17 inconvenience the parties because we need -- you
12:19:06 18 know, I need to know and Mr. Brockman needs to know
12:19:08 19 what's going to happen as soon as possible.

12:19:14 20 So with respect to your briefing --
12:19:16 21 I mean, how many pages are you looking at? I mean,
12:19:19 22 there's a lot. I mean, there's no question.

12:19:22 23 MR. COREY SMITH: We were going to
12:19:23 24 inquire. We brought this up before, Your Honor. If
12:19:27 25 the Court has some ideas of what they'd like --

12:19:29 1 you'd like to hear, narrow the issues to questions
12:19:31 2 that you have, we can then focus the briefs on those
12:19:36 3 issues. And we'd also ask for a page limit -- I
12:19:41 4 mean, the typical rules are 25 pages. We don't
12:19:44 5 think we need to go much past that, maybe 40.

12:19:48 6 But not unlimited, and focused on
12:19:50 7 the issues the Court wants to hear about. That's
12:19:53 8 what we would like to do.

12:19:54 9 THE COURT: Okay.

12:19:54 10 MR. LOONAM: Your Honor, I'll just add.
12:19:56 11 With respect to the timing of this and -- and -- and
12:19:58 12 the parties aren't far off. Um, I think the
12:20:02 13 additional time is useful. You know, the old adage
12:20:05 14 that, "If I had more time, it could have been a
12:20:08 15 little shorter."

12:20:10 16 THE COURT: Right.

12:20:10 17 MR. LOONAM: So for Your Honor's
12:20:11 18 benefit, you know, that time is helpful for us
12:20:13 19 instead of trying to scramble to get everything in,
12:20:15 20 and gives us time to work it down and make it more
12:20:18 21 focused. So I think it would be productive for all
12:20:21 22 sides to have that, and try to and focus it and try
12:20:23 23 to digest the vast volume of information of highly
12:20:27 24 technical and specific critical to this hearing.

12:20:31 25 On the page limit, you know --

12:20:35 1 MR. VARNADO: That's going to be more
12:20:37 2 than 25 or 40 pages. There's a lot here.

12:20:39 3 THE COURT: Yeah, there's a lot --

12:20:41 4 MR. VARNADO: We need to put some law
12:20:42 5 in front of you, as well as the facts. And, you
12:20:44 6 know, obviously we'll adhere to whatever guideline
12:20:47 7 restriction you give us, but I would submit this --
12:20:50 8 these submissions could be fairly lengthy, maybe
12:20:53 9 double the normal page limit.

12:20:54 10 THE COURT: Why don't you guys try to
12:20:56 11 reach some agreement and I'll think about it. I
12:20:58 12 will get back to you guys on Friday. So you think
12:21:03 13 about it, I'll think about it, and then we'll confer
12:21:06 14 after Friday with respect to what you guys are
12:21:10 15 thinking and I'm thinking.

12:21:12 16 Because as I said, the longer it --
12:21:15 17 the longer we put it off, the -- you know, the
12:21:20 18 parties need to get some resolution, one way or the
12:21:22 19 other, as soon as possible. Mr. Brockman needs to
12:21:25 20 know. The Government needs to know, so that
12:21:29 21 everybody can do whatever they need to do.

12:21:31 22 And I am reminded of what a wise
12:21:36 23 judge once said, which was a lawyer will agree to
12:21:39 24 his own execution date if you just give him an
12:21:42 25 extension.

12:21:44 1 MR. VARNADO: Judge, we're not trying
12:21:45 2 to put this off, but just given the amount of volume
12:21:49 3 and respect for the holidays on both sides.

12:21:50 4 THE COURT: I understand that. And I
12:21:52 5 don't want to jam you guys up as well. So why don't
12:21:55 6 you see if you can come to some agreement, and maybe
12:22:00 7 time agreement as to page length and briefing
12:22:03 8 schedule, and then submit something to me and I will
12:22:06 9 think about the same thing.

12:22:07 10 MR. COREY SMITH: Very good, Your
12:22:08 11 Honor. We'll do that.

12:22:09 12 THE COURT: Okay. With that, the
12:22:12 13 hearing's adjourned. Thank you all again for your
12:22:14 14 time. Happy Thanksgiving everyone. Safe travels
12:22:17 15 back to wherever.

12:22:19 16 MR. VARNADO: I'll be here, Judge.

12:22:20 17 THE COURT: Okay. Everyone else.

12:22:21 18 MR. LOONAM: I'm outta here.

12:22:27 19 MR. VARNADO: And thanks to your staff,
12:22:28 20 and really the time and attention. We really
12:22:29 21 appreciate it.

12:22:29 22 THE COURT: Not a problem. You all may
12:22:30 23 be excused, but I need to get things organized so
12:22:33 24 I'm not moving for awhile.

12:22:36 25 **(PROCEEDINGS ADJOURNED AT: 12:22 P.M.)**

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3 C E R T I F I C A T E

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5

6 I hereby certify that pursuant to Title 28,

7 Section 753 United States Code, the foregoing is a

8 true and correct transcript of the stenographically

9 reported proceedings in the above matter.

10 Certified on 11/29/2021.

11 
12 _____
13 Sean Gumm, RPR, CRR

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